THE

REPORTS

Of that Reverend and Learned

JUDGE,

Sir Richard Hutton

KNIGHT;

Sometimes one of the JUDGES of the

COMMON PLEAS:

Containing many Choice Cases, Judgments, and Resolutions, in Points of

LAW,

In the several Reigns of King *JAMES* and King *CHARLES.*

The Second Edition Corrected, with many Additional References to some late Reports.

Major hæreditas venit unicuique nostrûm à Jure & Legibus, quam ab iis, à quibus illa bona relicta sunt. Cic. pro Cæcin.

LONDON,
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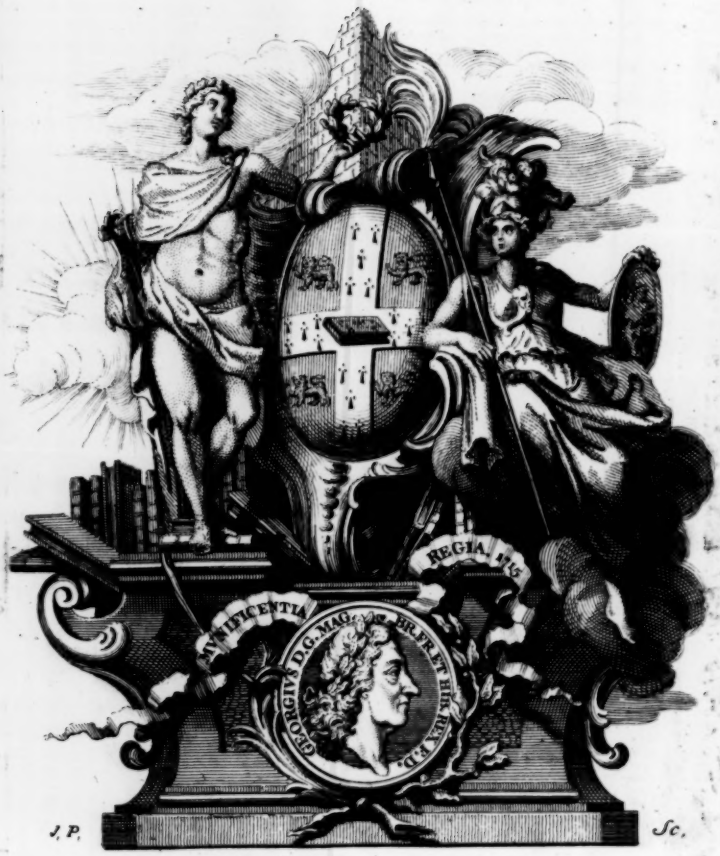
REGIA VIS
MUNIFICENTIA
GEORGIVS D.G. MAG. BR. FR. ET HIB. REX F.D.
J. P.
Sc.

COURTEOUS READER,

THIS juſt Judge (as the greateſt man (once) of this Nation was pleaſed to call him) was ſometimes Contemporary with the Lord HOBART; By reaſon whereof, though they may ſeem to meet ſometimes in Caſes, yet they part many times in the Points thereof, and the Arguments thereupon; CICERO and ROSCIUS together make one incomparable Man. And here our Learned Author appears, not to juſtle the Chief Juſtice out of his place, but to continue (as he was upon the Bench) a Friendly Aſſociate, and a Learned Aſſiſtant.

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PASCH. 15 JACOBI.

Combes *verſus* Inwood.

THE firſt day which I ſate at the Bench, after the day in which I was ſworn, i. e. Thurſday the twenty ſecond of May; A Jury was at the Bar from the County of Surrey, in an Ejectione firmæ, brought by Combes againſt Inwood, upon a Leaſe made by one John Stockwood, which was Heir to one Edward Stockwood, and was for a Farm in Chertſey, called Haylwick: And upon Evidence the Caſe appeared to be thus. Judge *Hutton* ſworn in C. B. *Ejectione firmæ*

Edward Stockwood was ſeiſed in fee, and about the 29 Hen. 8. this Land was ſuppoſed to be conveyed to King Hen. 8. in fee, for the enlargement of the Honour of Hampton; but no Deed, nor any other matter of Record was in being to prove this original Conveyance, and many Arguments were uſed to prove that there was never any ſuch Conveyance. becauſe there was not one of any ſuch Conveyance named in the Act of 31 H. 8. But of the other part it was proved, that this Land had continued in exchange as the Land of H. 8. all his Life, by divers accounts; and that it had been enjoyed by divers Leaſes made by Edward 6. and Queen Elizabeth, and Rent paid for them: And that in the year 16 Eliz. ſhe granted it in Fee-farm to the Earl of Lincoln, and under that Title the Land had been quietly enjoyed until of late time. Grant to the King not Inrolled, good.

And the Court delivered their opinion, That if there were a Deed by which Stockwood conveyed the Land to H. 8. and that brought into the Court of Augmentation; although this Deed be not found nor inrolled, yet it is a ſufficient Record to intitle the King, and it is a Record by being brought into Court, and there received to be inrolled. And the Report of the Caſe in Lord Dyer, fol. 355. 19 Eliz. was not as it is there reported, for it was for Bozun's Inne, and it was adjudged a good Conveyance; and in this caſe the Jury found for the Defendant. Deed brought into a Court to be Inrolled. V. apres 64. Records not Inrolled.

Trin. 14 Jac. Rotulo 769.

Steward *verſus* Biſhop.

Words. Hob. 177.

STeward brought an Action upon the Caſe for certain words againſt Biſhop, becauſe that the Defendant ſaid, Steward is in Leiceſter Gaol for ſtealing a Horſe and other Cattel, the Defendant pleaded not guilty, and the Jury found for the Plaintiff, and Damages to thirty pounds: And it was moved in Arreſt of Judgment by Serjeant John Moore, that the Action doth not lye, for the words do not affirm any Deed, or Act, or Offence, but that he was in priſon upon ſuſpicion of an Offence: And it is the ordinary ſpæch and communication by way of interrogation; What is ſuch a one in priſon for? For ſtealing: And all the Kalenders are, ſuch a one for ſtealing of a Horſe, ſuch a one for Murther, Vide Coke Lib. 4. he is detected for Perjury, is not actionable; And to ſay ſuch words of a Juſtice of Peace, or an Attorney, peradventure it ſhall be otherwiſe, yet it ſæms all one, if it touch not him in his Profeſſion. To ſay that I. S. was in Newgate for forging of Writs, will not maintain an Action, and ſo adjudged in Nowels caſe, and Judgment was given that the Action will not lye.

Paſch. 15 Jac.

Caſe. Aſſumpſit.

ONe brought an Action upon the Caſe, and counted, that the Defendant (in conſideration that the Plaintiff would take ſuch a woman to his wife) promiſed to pay twenty pounds when he ſhall be thereto requeſted after the marriage, and that the Plaintiff ſuch a day had married the ſaid woman, and the Defendant (though often requeſted) did not pay the aforeſaid twenty pounds: And it was moved in Arreſt of Judgment, that he had not ſhewn any particular requeſt; but yet Judgment was affirmed for the Plaintiff, for this Action is grounded upon the promiſe, which imports Debt, and not upon any collateral matter, which makes it a duty by the performance of a collateral Act upon the requeſt.

Requeſt, where it ſhall not be alledged. Vaspres. 73. & 106. 1 Croke 139.

Trin. 15 Jac.

Reſolved upon the Statute of 3 H. 7. Cap. 2.

Stealing of Women. 1 Croke 485, 488, 492. Hob. 182.

UPon divers Aſſemblies at Serjeants Inne of all the Judges to conſider (by the direction of the Star-Chamber) whether by the Statute of 3 H. 7. cap. 2. the taking of any woman againſt her will, and the marrying or deflowring of her, be Felony, or only of ſuch a woman which hath Subſtance, of Goods, or Lands, or otherwiſe be an Heir apparent: The body of the Act ſæms to be general, viz. He that ſhall take any woman ſo againſt her will: And it was ſaid, that it were a great inconvenience that it ſhall be Felony to take an Heir apparent of a poor

poꝛ man, oꝛ to take a Woman which hath but a very ſmall Poꝛtion, and of mean Parentage, and (as it was ſaid) of a Woman in a red Peticote, and that it ſhall not be felony to do and commit the ſaid Offence in taking the Daughter of an Earl, oꝛ ſome other gꝛeat man of the Realm. But it was reſolved that the body of the Act was incoꝛpoꝛated to the Pꝛeamble, foꝛ it had bæn adjudged, that if one take a Woman with an intent to marry her, oꝛ deflower her, &c. and doth it not, this is not Felony, and this reſts only upon the Pꝛeamble; then it ſhall have relation as well to ſuch a Woman which is befoꝛe named, viz. Maid, Widow, oꝛ Wife, having Subſtance, and to an Heir apparent, and to no other. 12 Rep. 21. ac: Savil 59.

And ſo it was taken in a Caſe in the Star-Chamber by the like reſolution, 10 Jac. betwæn Baker and Hall, and the Loꝛd chief Baron ſaid, that it had bæn adjudged, that no Appeal did lye upon this Statute, and all the Pꝛeſidents in effect warrant this reſolution, vide Stamford, fol. 37. Baker and Hall. 12 Rep. 100. Vide 1 Inſt. 363.

Statute 1 H. 4. Cap. 14.

COnſideration upon the Statute 1 H. 4. Cap. 14. was had, how the woꝛd Appeals ſhall be intended befoꝛe the Conſtable and Maꝛſhall.

And 26 Eliz. Doughties Caſe, Petition was made to the Queen by the Heir to make a Conſtable and Maꝛſhall, but ſhe would not. Doughties caſe. Vid. 1 Inſt. fo. 74. 6.

Admitting that the King grant a Commiſſion of the Office of a Conſtable and Maꝛſhall, whether the King may have any remedy befoꝛe them by Indictment, oꝛ Infoꝛmation by the Attoꝛney generall.

Mich. 15 Jac.

Andrews *verſus* Hacker.

AN Aſſiſe of Darrein Preſentment was bꝛought by Andrews againſt Hacker, and the Earl of Salop, and againſt the Archbiſhop of York foꝛ the Church of Gothur in the County of Nottingham; the Aſſiſe was bꝛought to the Bar, and when the Jury appeared, the Archbiſhop made default, and the others appeared, and pleaded in abatement of the Wꝛit, that the ſame Plaintiff had befoꝛe bꝛought a Quare impedit againſt the Defendants foꝛ the ſame Church, which Wꝛit was returned, and that they did appear to defend it. Aſſiſe.

Firſt, we muſt know that this Aſſiſe ſhall be taken only in the Common Bench, vide Mag. Chap. cap. 13. then the Arch-biſhop making default, and the Aſſiſe being awarded againſt him by default, if the other Defendants plead to the Aſſiſe, yet the Aſſiſe ſhall not be pꝛeſented, becauſe an Aſſiſe ſhall not be taken by parcels, and theꝛefoꝛe a Reſummons ſhall be awarded againſt the Arch-biſhop, and the ſame foꝛ the Jury. Aſſize of Darrein preſentment, abate by a *Quare impedit*. Not taken *per* parcels. Reſummons.

But the other Defendants pleading their Plea to the Wꝛit, the Court was of opinion that it was a good Plea in abatement of the Wꝛit, foꝛ the Quare impedit is a Wꝛit of a higher nature, vide Regiſt. fol.

fol. 30. That if he againſt whom an Aſſiſe of Darrein Preſentment is brought, brings a Quare impedit, the Darrein Preſentment ſhall abate: And the Statute of Weſt. 2. cap. 5. ſaies, it may be in the Election of one, whether he will have an Aſſiſe of Darrein preſentment, or Quare impedit, ergo he cannot have them both.

And if an Aſſiſe of Darrein preſentment be brought, and after that a Quare impedit for one avoidance, the Aſſiſe ſhall abate, for the Quare impedit is higher in his nature, that is, for the right, and for the poſſeſſion. And Juſtice Warburton vouched 10 Ed. 3. Statham in Darrein preſentment 3. If a man ſhall have a Quare impedit, and alſo an Aſſiſe of Darrain preſentment, of one and the ſame Advowſon, pending at one and the ſame time, the Darrein preſentment ſhall abate, and the Quare impedit ſhall ſtand, becauſe that it is of an higher nature. By Hank and Hill, it was urged that the Quare impedit was not depending untill he had appeared, and it is not pleaded that he did appear; but vide 2 Ed. 4. fol. that it is depending when it is returned. And in a Quare impedit by the Earl of Bedford againſt the Biſhop of Exeter, it was adjudged Paſch. 15 Jac. that he could not have two Quare impedits of one Church, and for one avoidance. And in this Caſe the whole Court agreed that the plea was good in abatement of the Writ, and awarded that the Aſſiſe ſhould abate.

Bedford verſus the Biſhop of Exeter.

Mich. 14. Jac. Rot. 3297.

Shaw *verſus* Taylor.

Wigorn. Hob. 176. Replevin. Where the Lord ſhall loſe his Heriot when the Tenant hath not any Beaſts.

BRidget Shaw brought a Replevin againſt Georg Taylor, for the taking of an Horſe at Northfield, in a place called Little falling; the Defendant makes Cognizance as Bayliff to Sir Thomas Gervas, becauſe that one Richard Shaw was ſeiſed of an Houſe and divers Lands, (of which the place where, &c. was parcell) in his Demeſn as of Fee, and them held of the ſaid Sir Thomas Gervas, as of his Mannor of Northfield, by Fealty and Rent of twenty pounds, and rendring and paying after the death of every Tenant (dying thereof ſeiſed) one Heriot, and alledged Seiſin, and that he died ſeiſed: And that for one Heriot ſo due, and not delivered, he diſtrained in the place in which, &c. as within the Fee. The Plaintiff plead in Bar to the Avowry, and takes the whole Tenure by proteſtation, and for Plea ſaies, that the ſaid Richard Shaw at the time of his death had no Beaſts, whereof a Heriot might or could be rendred, upon which the Defendant demurrs.

And upon the matter it ſeemed to the Court, that if he had not any Beaſts, then the Lord muſt loſe it: for it is a caſuall thing if he have it, unleſſe the Cuſtom or Tenure be to have the beſt Beaſt, or ſuch a ſumm: And if he had conveyed it away, and ſo prevented him by any fraud, then the Statute of 13 Eliz. had provided remedy, but where there is nothing of any ſuch thing, which may be rendred at the time of the death, there the King muſt loſe his right. And it was reſolved by the Court that the Cognizance was not good, for it ought to be certain, i. e. for the beſt, or two beſt Beaſts, and not generally for one Heriot, and not ſhewing what thing in certain, vide 3 Eliz. Dyer 199.

Heriot plead-ed.

1 Croke. 760. Contr. V. 1 Bul. 102.

A Heriot

A Heriot is Quædam præſtatio, &c. and ſee there the Plea, that there was no Beaſt at the time of his death: And the opinion of the Court was alſo, that the Bar to the Avowry was not good, becauſe the Iſſue is tended to a thing not alledged, for in the Avowry he made not mention of any Beaſt, but generally of one Heriot, which is not certain: And therefore it was awarded that the Plaintiff ſhould recover, and ſhould have a return, &c. and Damages.

Paſch. 14 Jac. Rot. 907. *Goldsborough.*

Norris *verſus* Stapes.

Berk.

RObert Norris and Thomas Truſſels Wardens, and the Society of Weavers, in the Burrough of Newbury, in the County of Berkſhire, brought an Action of Debt for five pounds againſt John Stapes, and Count, that Queen Eliz. by her Letters Patents, 14. of Octob. An. 44. at the requeſt of the Inhabitants there uſing the Art of Weaving, and to the intent that Corruption therein might be taken away and avoided, &c. did grant to all Weavers within the ſaid Town to be a Body Politick, by the name of the Wardens and Society, &c. as before, and to have perpetual ſucceſſion and power to purchaſe, to plead, and to be impleaded: And alſo power to make Laws and Ordinances agreeable to reaſon, and not in any wiſe contrary and repugnant to the Laws and Statutes of the Realm, for the well Government of the Society, Apprentices, and Servants, and all uſing the Trade of weaving or ſelling of any thing thereto belonging within the ſame Burrough, and power to inflict puniſhment by Impriſonment, Fine, or Amercement upon the Offenders: And granted further, that the ſaid Wardens and Society ſhall have the ſurvey of thoſe Laws, and the benefit of the Forfeitures; And that no other perſon, born within or without the ſaid Burrough, ſhall exerciſe the Art of weaving within the ſaid Burrough, if he ſhall not be admitted thereto by the Wardens and Society. And they recite the Act of 19 H. 7. cap. 7. of not putting of any Law or Ordinance in execution, before it ſhall be allowed by the Lord Chancellor, Treaſurer, and two chief Juſtices, or three of them, or before both the Juſtices of Aſſiſe in their Circuits, upon pain of forfeiting forty pounds: And ſhew that one Cuthbert Goodwin, and John Hame Wardens of the ſaid Society, with the greater part of the ſaid Society, 1. Maij 45. Eliz. at the Guildhall within the ſaid Burrough, made divers Laws and Ordinances for the Government of Weavers; and that the 18 Novemb. 1 Jac. the ſaid Orders were confirmed by the Lord Chancellor, Lord Treaſurer, and Lord Anderſon one of the chief Juſtices, among which one was, that none ſhould uſe the Art of weaving within the ſaid Burrough, or ſhould have any Loom in his houſe or poſſeſſion, to have any benefit thereby, unleſs he had been an Apprentice to the ſaid Art within the ſaid Burrough, for the ſpace and term of ſeven years, or had uſed the ſaid Art within the ſaid Burrough for five years before the making of the ſaid Ordinance, or ſhall be admitted thereto by the Wardens and Society, upon pain of forfeiture for every month twenty ſhillings.

Det. 1. By-laws. Hob. 210. Weavers of *Newbury.* 19 H. 7. 7.

And they further ſhew, that after the ſaid Ordinance made and con-

firmed, the Defendant (ſuch a day) before his inhabiting in the ſaid Burrough; and after (ſuch a day) that one William Goodwin being then Warden of the Weavers, gave notice to the Defendant of the ſaid Ordinance, and that he afterwards, &c. during the five months continued uſing the ſaid Trade there, and that he had two Looms in his poſſeſſion, where he had not been an Apprentice, nor uſed the ſaid Art for five years, as before, &c. by which he forfeited to them five pounds, viz. for every month twenty ſhillings.

The Defendant pleaded Nil debet, and after Verdict for the Plaintiffs, it was moved in Arreſt of Judgment, that this Ordinance was not reaſonable: and upon Arguments and Conference, without arguments at the Bench, it was agreed that the Ordinance was againſt Law, and Judgment againſt the Plaintiffs.

And Lord Hobart in Hil. 15 Jac. declared, that we were all of opinion that Judgment ſhould be given againſt the Plaintiffs: And he repeated the Caſe and the reaſons of this Judgment, becauſe the Ordinance was, that none ſhould uſe the Trade of Weaver, nor have any Loom in the Town, unleſs he had ſerved, &c. before the making of this Ordinance, ſo that all Apprentices which ſerve after ſhall be excluded, unleſs they ſhall be admitted by them, which is unreaſonable: And the Plaintiffs do not convey to themſelves any good Title to the Wardens, but as to the principal point of making ſuch a reſtraining Ordinance, the Court did not deliver any Opinion.

Ordinance in Trade.

Mich. 15 Jac. Rot. 2327.

Dorrell *verſus* Andrews.

London. Debt. The Viſn of a Town within a Pariſh. Hob. 190.

SUſan Dorrell brought an Action of Debt againſt Sir Euſebius Andrews, and John Cope for eighty five pounds, and count upon a Leaſe made by her to the Defendants by Indenture, by which ſhe demiſed one Capital Meſſuage, Manor, or Houſe called Cauſton, within the Pariſh of Dunchurch in the County of Warwick, and all the Stables, &c. in Cauſton aforeſaid.

The Defendant proteſting that the Rent was not behind, for Plea ſays, that before any Rent arrear the Plaintiff entred into ſeveral parts of the houſe, and him diſpoſſeſſed, and upon that they were at iſſue, and the Venire facias was de vicineto de Cauſton within the Pariſh of Dunchurch: And it was moved in Arreſt of Judgment, that the Venire facias ſhould be of the Pariſh only, and not of Cauſton, for Cauſton is not alledged as a Town, but the name of a houſe: And the Court reſolved that the Ven. fac. was good, for Cauſton is alledged as a Town in the Pariſh of Dunchurch; and that by the addition and general words in the Demiſe, in which alſo there was an exception of part of the Houſe or Manor-houſe at Cauſton aforeſaid, ſo that the houſe is alledged to be in Cauſton, in the Pariſh of Dunchurch, if all be conſidered: And if it appear that Cauſton is a Town or Village in the Pariſh of Dunchurch, it will be without any doubt good.

Good either from Town or Pariſh.

And my Lord Hobart ſaid, that it had been divers times adjudged, that on the Allegation of a thing done at the Town of Dale in the Pariſh of Sale, that the Ven. fac. of the Pariſh is good, for though the Pa-

riſh

riſh may contain moze Towns, yet it is not to be pzeſumed but that it is of one Continent, if the contrary appear not by the Recozd, vide foz that Paſch. 9 Jac. between the Lozd Candiſh, and Sir George Savill, &c. There was another exception taken to the pleading, which I have not tranſcribed. *Candiſh and Savill.*

Trin. 14 Jac. Rot. 755.

Swaine *verſus* Holman.

RIchard Swaine Plaintiff, againſt Thomas Holman and Elizabeth his wife, bzought Waſt, and declared of a Leaſe made, Anno the 8. of Eliz. by the Queen, under the Exchequer Seal, to William Jolliff, Thomas Jolliff, and Elizabeth Jolliff, foz thzee lives, and that William and Thomas were dead, and conbey the remainder to the King that now is, and from him to the Plaintiff, and that the Defendant Elizabeth took H. to Husband, which did waſt, &c. *Brownlow. Dors. Waſt. Hob. 203.*

The Defendants confeſs the Leaſe, death, and marriage as above, &c. and ſay, that the ſaid Holman and Elizabeth his wife, 2. Feb. 40. Eliz. ſurrendzed as well all their Eſtate of the ſaid Elizabeth, as the Letters Patents, to the intent that the Queen ſhould make a new Leaſe to the ſaid Elizabeth, and to Humphrey Holman, and to Roger Holman foz their lives ſucceſſibely, which ſurrender the Queen accepted, and the third of Febr. next made ſuch Demiſe, and this they are ready to aber, &c.

The Plaintiff replies, and joyns Iſſue upon the Surrender and Demiſe in manner and fozm, and the Iſſue was tried by a Venue which came from Weſtminſter, and the Jury found this ſpecial Verdict, viz. the new Leaſe made the third of Febr. in which it is recited that ſhe had ſurrendzed the Eſtate, and the Letters Patents, and the Queen as well in conſideration of the ſurrender of the Letters Patents, as in conſideration of the payment of twenty Nobies made the new Leaſe, and the Jury found that the Demiſe made the third of Febr. was with the conſent of the ſaid Thomas Holman, and that the ſaid Thomas Holman and Elizabeth his wife agreed thereto, and held in claiming by the ſaid Demiſe: And it was adjudged by the Lozd Hobart, and others the Juſtices, that the Plaintiff ſhould have Judgment.

Firſt, the conſideration which pzocured the new Leaſe is the Surrender, and the Surrender is not abſolute but defeiſable if the wife ſurbibe, oz if the Husband will diſagree; and therefoze the Lozd Hobart ſaid, that if Feme Leſſee foz pears takes Husband, and after the Feme takes a new Leaſe of the Queen foz life, this extinguiſheth the term; but if the Husband diſagree, then the Leaſe foz pears is rebibed. And as in Barwicks Caſe, the ſurrender of all the Eſtate where he had made a Leaſe foz pears befoze, oz where the Leaſe which he ſurrendzed was void, the new Leaſe made in conſideration thereof is void, foz the Surrender which is the conſideration, ought to be a good ſurrender of the fozmer Eſtate: And therefoze if Leſſee foz life of the Demiſe of the King ſurrender conditionally, and the King reciting that *Surrender in Law of Leaſes. Baron & Feme. Feme accepts a new Leaſe. Conſideration of Surrender. Per King.*

that he had ſurrendred all his Eſtate, makes a new Leaſe, this ſhall be intended an abſolute Eſtate, for a conditional ſurrender within three years of the Leaſe, is not a ſurrender within the Act of 32 H. 8.

2. Another reaſon, becauſe that the Freehold which the Husband had in the right of his wife, could not be given by this bare aſſent; But if the Leaſe had been made, de novo, to the husband and the wife, then it had been queſtionable, for the Eſtate paſs by Implication, viz. by a ſurrender in Law, by acceptance of a new Leaſe, as in the eighth Report of the Lord Coke, S. Savors Caſe, but there no Eſtate of the Husband paſs, for by the inter-marriage he was in of the Freehold with his wife, in the right of his wife, and that he gives not by aſſent. Vide 7 H 7.14. vide 41 E.3.fol.19.

Acceptance of new Leaſe *per* Feme covert, no ſurrender of her Freehold.

3. Another reaſon was, as this iſſue is joyned, it is found againſt the Defendants, for it ſhall be thereby taken and intended of an actual ſurrender made by the husband and wife, and not of ſuch a ſurrender which is operated by a ſubſequent act in Judgment of Law, and the reaſon thereof is, becauſe that the ſurrender of the Eſtate, and the cancelling of the Letters Patents are pleaded to be done at Weſtminſter, 2 Febr. and the Leaſe, 3 Febr. ſo that this Iſſue is taken upon an actual ſurrender: And by Warburton, if iſſue be joyned upon the Manumiſſion of a Villain, that is not maintained by giving in evidence that the Lord made to him an Obligation, but by the making of him free by Charter of Manumiſſion. Vide the Caſe directly, 25 H.8. Brook general Iſſue 82. vid. Dyer 284. Crouch's Caſe.

V. poſt 104. Iſſue joyned, not proved by Judgment of Law.

Memorand. That in this Caſe the Jury of Middleſex found the Damages, and the value of the Waſt in the County of Dorſetſhire, vide Coke lib.6.fol.47. Dowdales Caſe.

Jury of *Midd'* find Waſte in *Dorſetſhire.*

Mich. 15 Jac. Rot. 1634.

Gibbs *verſus* Davie.

EDward Gibbs brought an Action upon the Caſe againſt Jenkin Davie, for words ſpoken in the Welſh Tongue, and declared that the conference was had by Baron Snigg with the Defendant, concerning the felonious ſtealing of three Heifers, and the Defendant is ſuppoſed to anſwer to the queſtion in Welſh, whether Thomas Jackſon ſtole them; If he had them, I ſhould have had them again, but Edward Gibbs ſtole them: And upon Not guilty pleaded, it was found for the Plaintiff at Briſtoll: And it was moved this Term in Arreſt of Judgment, that the words in Welſh did not ſignifie ſtealing, but carrying away upon ones back: And it appeared upon examination of one Mr. Gunter upon Oath, that it is properly the word for carrying, though that there in the intendment of the parties it might be taken for ſtealing, it being joyned with other precedent circumſtances, yet it is not actionable, for it ſhall be taken in the moſt favourable conſtruction and beſt ſenſe, as if one had ſaid, That ſuch a one had the Pox, and forbid one to uſe his company, it ſhall not be intended of the French Pox, and no Action lies: And Judgment was given for the Defendant, yet it was averred in the Count, that the words were ſpoken in the hearing of them which underſtood the Welſh Language. Hil.

Caſe. Welſh words.

Conſtrued after Verdict.

Hob. 191, 126.

Mich. 14 Jac. Rot. 953.

Leigh *verſus* Paine.

Oxon.

MAtthew Leigh brought an action of Debt upon an Obligation a- Debt.
gainſt Matthew Paine, which was with condition for the perfor- Hob. 191.
mance of an Arbitrement, which was of all Actions, Quarrels, &c. depending between them: The Arbitrators award, that the Defendant ſhould pay to the Plaintiff ſuch a ſum, &c. for content and in full ſatisfaction of all Actions, Quarrels, &c. until the day of the date of the Arbitrement: And upon Demurrer by the Defendant, it was debated whether this was a good Arbitrement, it being that the Arbitrator had exceeded his Authority in giving ſatisfaction for Treſpaſs after the ſubmiſſion, that is, until the date of the Arbitrement; and it ſeemed to the Court that it is a good Arbitrement, and that it appears not to the Court that there were any Treſpaſſes or Suits after the ſubmiſſion, and that ſhall not be intended until it be ſhewn by the other part, as in the caſe of Baſpool, Co. lib. 8. fo. 98. where ſubmiſſion was of all controverſies, ſo that the Award be made of the Premiſſes, &c. there the Arbitrators made an Award of divers particulars, and the Award was good, and he that will avoid it muſt ſhew, that there were other controverſies, and that he gave notice of them to the Arbitrators, for they ſhall not be bound to arbitrate of more than they have notice of, Dy. 242. 19 E. 4. 1. v. Sammons caſe, Coke lib. 5. fol. 77. That an Award ought to be reaſonable, and to be done between the ſame parties: And therefore the Arbitrement that the husband & wife ſhall levy a Fine where the ſubmiſſion was by the husband only, is void (but quære) if it be not good as to the husband, and vide in James Osborns caſe, Coke lib. 10. fol. 131. There the caſe of More and Bedle is vouched, and is adjudged, that where it is awarded that a certain ſum ſhall be paid, and for the payment thereof a ſtranger ſhall be bound, it is a good Award, though as to the giving of ſecurity by a ſtranger it is void, and there it is ſaid, if ſatisfaction be to be given for many things, of which part is out of the Award, yet it is good for them which are ſubmitted unto, vide 42 & 43 Eliz. Newby and Say. An Award to make a releaſe to the date of the Arbitrement, and good if it does not appear that there was other matter. A ſubmiſſion of all matters done till the fourth of September, the Award was of a Releaſe of all matters until the third of September, and good; And this caſe was vouched to be between Barnes and Grenewell, Trin. 43 Eliz. Rot. 947. vide a caſe between Hilton and Brown, Trin. 5 Jacobi Rot. 1618. an Arbitrement was made general in ſatisfaction of all Controverſies indefinitely without any limitation: And upon Argument upon Demurrer, it was adjudged good, and in this caſe the Arbitrement will not diſcharge any action which was not ſubmitted unto; and then it is but Surpluſage which ſhall not avoid the Award, though the Plaintiff hath more recompence by the Arbitrators, in reſpect that the Defendant ſhall be diſcharged of Treſpaſſes until the making of the Arbitrement: And Judgment was given for the Plaintiff.

Arbitrement of all Actions until the date of the Award.

Baron ſubmit, and by award the Legacy due to the wife be paid to baron, and wife ſhall releaſe; adjudg'd good. Mich. 1652. B. R. *Smith* and *ward*. *Newby* and *Say*.

1 Cro. 216. Browns caſe.

Mich. 11 Jac. Rot. 318.

Agars *verſus* Liſle.

Caſe. Hob. 187.

THomas Agar brought an action upon the Caſe againſt Liſle, for finding and converting of a Cow at the Caſtle of York, the Defendant pleaded in Bar, that the Biſhop of Durham was ſeiſed of the Town of Darton, in the County of Durham, and preſcribe to have a Fair there and Toll, and for not payment thereof, &c. the Cow was taken by the Defendant, as Servant to the Biſhop of Durham, Abſque hoc, that he was guilty at the Caſtle of York, or any where elſe, &c. And this Caſe was long depending, and the firſt point was, if the Defendant had confeſſed any converſion, for that is the ground of the Action, and ought to be traverſed, or elſe confeſſed and avoided: It was agreed, that the Converſion is the ground of the Action, Brook 1 Mar. Treſpaſs 121. and the Inducement ought to be ſuch as contain ſufficient matter with the Treſpaſs, vide 9 E. 4. 5. 19 H. 6. 30. 22 H. 6. 35. Then it was agreed, that when one takes a Diſtreſs and ſuch an action is brought, that is no plea, for that is not any converſion, vide 27 H. 8. 22. Coke lib. 10. fol. 46, 47. Requeſt and refuſal to deliver, is good evidence to prove converſion, but if it be found ſpecially it ſhall not be adjudged Converſion; and Judgment was given for the Plaintiff, becauſe the Defendant did not claim any property, and did not anſwer to the point of the Action, for a Diſtreſs is no Converſion.

Trover and Converſion juſtified without confeſſing the Converſion, not good.

1 Cro. 262.

Hil. 15 Jac.

Coble *verſus* Allen.

Norf.

Treſpaſs. Hob. 189.

COble brought an action of Treſpaſs againſt Allen for breaking his Cloſe at Barningham, and by the new Aſſignment divers parcels were aſſigned, the Defendant as to part pleads that he was ſeiſed of an Houſe and thirty acres of Land in Colby, and preſcribe to have a way over them to his Common in Barningham; and for the other parcels preſcribe, that he and all thoſe whoſe Eſtate he hath in the ſaid houſe in Colby, uſed to have for themſelves and their Families, one way for Pack-horſes over the ſaid other parcels of Land in Barningham, unto the Kings High-way leading to the City of Norwich: And Iſſue was joyned upon theſe two Preſcriptions, and found for the Plaintiff: But it was moved in Arreſt of Judgment, that the Venue was from Barningham and Colby, and that in the Plea there is not mention of any place where the Common lies, and therefore there is not any trial; but it was adjudged that the trial was good, for though that the proper uſe of a way is to ſome end, and that ought to be ſhewn, yet if it be only that he had a way over the Cloſes of the new Aſſignment; and no place or end thereof is pleaded for what cauſe, or to what other place, and Iſſue is taken upon the Preſcription, and found, the Preſcription is good: And another reaſon was there by Implication; it is indifferent whether the way lies in B. or in another Town, and by intendment rather it may be taken to lie in B. and then if by one intendment the trial may be good, it ſhall be ſo intended.

Preſcription for a Way, and no place to which, &c. Iſſue joyned upon the Preſcription. Whence the Venue?

tended. But when it appears that the trial ſhall be in three Towns, and the Ven. fac. is but in two, this is not aided, for it is a Miſ-trial, and there muſt be a Venire facias de novo, but in this caſe no new Venire can be awarded, and then it is but a Jeofaile for not pleading in which Town the way lies, and then it is aided; and alſo unto the Kings high-way, may be taken that this Kings high-way is contign adjacent to theſe Cloſes where the way is by Preſcription: And for theſe reaſons and cauſes Judgment given for the Plaintiff.

Venue in two Towns for three.

Harding *verſus* Bodman.

RObert Harding Plaintiff, againſt Bodman Defendant, in an action upon the Caſe; recites, that whereas the Plaintiff brought an action upon the Caſe againſt one Lenning for calling of him, &c. the Defendant upon the trial, being produced for the Defendant as a Witneſs, gave evidence upon his Oath to the Jury, that the Plaintiff was a common liar, and ſo recorded in the Star Chamber, by reaſon of which Evidence (though the Jury found for the Plaintiff, yet by reaſon hereof) they gave but ſmall damages to the Plaintiff: And upon not guilty pleaded, it was found for the Plaintiff; and upon motion in Arreſt of Judgment, it was adjudged that this is a new invention, and that no action lies for it. Firſt, becauſe that it is impoſſible to be known whether the Jury gave greater or leſs Damages for that or not: Alſo by this means every man which is produced as a Witneſs by one way or other, may be ſubject to an action upon the Caſe; and alſo by any thing which appears to the Court, the Evidence was true, for it was not averred that Re vera, that the Plaintiff was not a common liar, and that he was not recorded for a common liar, in the Star Chamber; and for theſe reaſons the Plaintiff, Nil capiat per breve, &c

Caſe.

Action upon the Caſe againſt one for giving evidence.

Trin. 15 Jac. Rot. 1968.

Speake *verſus* Richards.

South.

HUgh Speake brought an action of Debt againſt Edward Richards, for 523 l. 17 s. 8 d. and declare, that Anthony Hall, and Henry Paramour 22 June 13 Jac. became obliged to the Plaintiff by Recognizance in the Chancery in 2000 l. and that they did not pay it, whereupon the Plaintiff had two Scire fac's to the Sheriff of Middleſex, who returned Nihil, whereupon Judgment for the Plaintiff, and a Levari fac' awarded to the Sheriff of Southampton, returnable 15 Mich. which Writ was delivered to the Defendant, being then Sheriff, to be executed: The Defendant before the Return levied by virtue of the ſaid Writ, the ſaid 523 l. 17 s. 8 d. of the Lands and Chattels of the ſaid Henry Paramour, parcel of the ſaid Debt, and at 15 Mich. returned, that he had levied the ſaid 523 l. 17 s. 8 d. parcel, &c. which ſum he had ready at the day to deliver to the Plaintiff in part of ſatisfaction, &c. And that the Defendant (although often required thereto) refuſed to pay the ſaid 523 l. 17 s. 8 d. (by cauſe whereof this action accrued) nor brought it into Chancery, and to have the parties, &c.

Debt. Hob. 206.

Debt for money returned levied by the Sheriff.

The

The Defendant as to three hundred and eight pounds, part thereof, pleaded Nil debet, to two hundred and fifteen pounds ſeventeen ſhillings eight pence, reſidue thereof, Actio non: For he ſaid, that after the Writ directed, and before the return, viz. 31 Auguſti, 14 Jacobi, the Defendant at Weſtminſter paid it to the Plaintiff, upon the receit whereof, the ſame day the Plaintiff gave an Acquittance for the ſame (which he pleads) and thereby acquitted and diſcharged the Defendant, and demands Judgment if againſt his own Deed of acquittance he ſhall be received to demand the ſaid money, whereupon the Plaintiff demurred.

Nil debet to Debt upon Record pleaded.

And it was argued by Serjeant Richardſon for the Plaintiff, and by John Moore for the Defendant: An exception was taken that he could not plead Nil debet, becauſe that it is a Debt upon Record, for he is charged by the return; He is not eſtopped to plead payment before the return, becauſe it is another Action, and the Sheriff might have paid it to the Plaintiff, though he return that he had the mony ready to be delivered to him; for if he had after that paid it to the Plaintiff, that was good ſatisfaction, and he might as well pay it after he had levied it, and before the return, as he might pay it after the return, and then Nil debet is a good Plea.

But it was objected, that by the return 15 Mich. that he had the money ready (and that after the Acquittance) his return ſhould conclude him: And it was ſaid that it would not, for it is in another Action and ſtands therewith, 22 E. 4. 38. One vouched as heir might be bound to Warranty by his Father, and if he bring an Aſſiſe De morte Anteceſſoris, and the Tenant plead Baſtardy, it is no Eſtoppel that the Defendant vouched him as Heir before.

Releaſe before poſſeſſion.

The Acquittance or releaſe is good before the return, and not like unto Hoes Caſe of Bail, Coke, lib. 5. 71. or 5 Eliz. Dier 217. Releaſe of Actions and Suits will not releaſe a Covenant before it be broken.

Object. That the Acquittance or Releaſe is pleaded only by recital.

Reſp. To this it was anſwered, that he had paid the two hundred and fifty pound, seventeen ſhillings eight pence, which the Plaintiff had accepted, and the Plaintiff by Demurrer had confeſſed the Deed, and all that is contained therein, then it appears that he is ſatisfied, and that the releaſe in matter as it is recited ſhall be an Eſtoppel, vide 46 Eliz. 13. But it ſeemed that it is no Eſtoppel by the reciting in the Releaſe that which is in poſſeſſion, but that afterward he might well ſay, that he was not in poſſeſſion at the time of the Releaſe, and all the Court agreed, that the Acquittance or Releaſe, and receit of the mony is a good Bar as to two hundred and fifteen pounds, seventeen ſhillings eight pence, and ſo it was adjudged: But whether an Action of Debt lies againſt the Sheriff upon this return is queſtionable, yet that it is not any Contract, Account, or Loan, upon which three properly an action of Debt lies, as it is ſaid M. 18 E. 4. 23. and 41 E. 3. 10. and 42 E. 3. 9. When money is delivered to be delivered over, that no Debt lies if it be not delivered over, but Account, vide 34 H. 6. 36. a. 9 E. 4. 50. And the Court inclined, that in this Caſe Debt lies, for it is a general Contract: In Dowſes Caſe, the Sheriff levy part and do not return it, but the party pay it, Debt lies againſt the Sheriff: And if money be delivered to buy Land, if he buy it not, Debt lies, or Account.

Debt againſt Sheriff. V. 1 Cro. 540. Debt lies againſt Executors of Sheriff.

Mich.

Mich. 15 Jac. Rot. 636.
Stone *verſus* Roberts.

STone brought an Action upon the Caſe againſt Roberts for theſe words; The Plaintiff is a witch, and an Inchaunter, and hath bewitched the Children of one *Strong*: And Judgment for the Plaintiff; For though Witch is a word of malice, and familiarly uſed to old poor women, and therefore no Action lies, yet here it is coupled with a Deed, by which the Plaintiff is drawn in danger of his life, by the Statute of 1 Jac. Caſe. Words. V. apres. 132.

Hil. 15 Jac. Rot 710.
Crawley *verſus* Kingſwell.

RIchard Crawley Plaintiff, in Replevin againſt Richard Kingſwell, for taking of one Cow at C. the Defendant makes Conuzance for ten pounds Rent-ſervice as Bayliff to his Father, the Plaintiff confeſſe the Tenure, but alledge that at our Lady day (which was one day of payment) he was upon parcell of the Land, and there was ready and offered to pay it, and remained there till after the ſetting of the Sun: The Defendant replyed and (proteſtando that he made no ſuch tender) for plea ſaith, that after that, and before the diſtreſſe, viz. ſuch a day, he at this Cloſe demanded the Rent, and none came there to tender or pay it, for which he did diſtrain, and praies a return, &c. and avers that the Plaintiff nor any other, neither at the time of the diſtreſſe, nor at any time after offered to pay the Rent, whereupon the Plaintiff demurred; and it being argued by Hendon and John Moore, it was adjudged by the whole Court that the Defendant ſhall have a return: And a diverſity was taken between this and Homage, where one makes a tender to the party, and he refuſe, there he cannot diſtrain, becauſe it is a perſonall thing which cannot be performed (as payment of a Rent may) by another hand, vide Litt. fol. 35. 21 E. 4. 17. 7 E. 4. 4. 20 H. 6. 13. Alſo it was agreed, that the tender there by the Tenant at the day is not materiall, but if he had tendred it when the Diſtreſſe was taken, the taking ſhould be tortious, 30 Aſſ. 38. vide 22 H. 6. 36, & 37. 21 E. 4. b. 45 E. 3. 9. vide Litt. 7. fol. 28.

Demand neceſſary only for a Penalty.

Replevin. Hob. 201.

Rent ſergice tendered at the day, yet the Lord may diſtrayne.

Contr. if tender on diſtreſs taking.

26 Eliz.
Certain Caſes vouched in an Action for words.

GIttings Plaintiff in the Exchequer, againſt Redſerve. Gittings is a couſening Knave, and ſo I have proved him before my Lord Mayor, for ſelling me a Saphire for a Diamond, the Action does not lye: And by Manwood, if A. ſaies of B. Thou art a couſening Knave, and haſt couſened me of five hundred pounds, no Action lies, which the Court agreed.

Banco Regis 30 Eliz.

George *verſus* Whitlock.

HE is a couſening knave, and couſened a poor man of a hundred pounds, and all the Georges are couſening knaves, no action lies.

Hil. 30 Eliz. B. R.

Walcot Plaintiff *verſus* Hind.

HE is a couſening knave, and hath couſened me of forty pounds, adjudged no action lies: And upon Error brought in the Exchequer, Judgment was affirmed, and it is ſaid that our Law takes no notice what a Couſener is.

Trin 37 Eliz.

Brookes Caſe.

HE is a falſe knave, and keeps a falſe Debt Book, for he chargeth me with the receit of one peece of Velvet which is falſe, not actionable.

Mich. 37 and 38 Eliz.

Charter *verſus* Hunter.

THou art a Pilfring Merchant, and haſt Pilfred away my Goods from my Wife and my children, not actionable:

A Butcher and his Wife brought an action upon the Caſe againſt B. and his Wife, and ſhew that the Plaintiff uſed the Trade of a Butcher, and that his Wife in his abſence ſold and delivered fleſh, and the words were, that the Wife of the Plaintiff is a couſening woman, and hath couſened one of her Neighbours of four pounds; And it was alledged over, that ſhe the Defendant, would bring good proof of it, and adjudged that an action lies not.

Trin.

Trin. 13 Jac. Rot. 650.

Heard *verſus* Baskerfield.

Brownlow.

Devon.

WIlliam Heard Plaintiff, againſt Richard Baskerfield in Replevin for taking two Cowes at Brood, the Defendant makes Conuzance as Bayliff to John Dinham Eſquire, and ſhews that Walter de la Therne was ſeiſed in Fee of twenty acres of Land, whereof, &c. And by his Deed (ſhewn in Court 12 E. 2. granted a Rent-charge of two ſhillings out thereof to John Milleton and Walter Milleton, John Milleton dies, and Walter ſurviued and died ſeiſed; and this Rent deſcended to one John Milleton of P. as Coſin and Heir to the aforeſaid Walter, and he was ſeiſed in Fee; and one John Dinham was ſeiſed in Fee of one houſe and twenty acres of Land in Penſons, and by Deed (ſhewn in Court) exchanged them with the ſaid John Milleton for the ſaid Rent; and Walter de la Therne being ſeiſed of the Land out of which the Rent iſſued, attorned, and gave Seiſin of the Rent to John Dinham, whereby he was ſeiſed in Fee of the Rent, and conueyed the Rent by three diſcents to this John Dinham, for whom the Defendant makes Conuzance for ten ſhillings for five years arrear: And the Plaintiff demurs generally upon the Conuzance. And the cauſe was, that it is not ſhewn how John Milleton is Coſin and Heir to Walter upon the diſcent.

Replevin. Hob. 232.

In Replevin, one makes Conuſance & derives his Eſtate from one as Coſin and Heir, and ſhews not how.

First if it be good as this Caſe is, viz. That he claimes not as Coſin and Heir, but makes Title under him by conueyance afterwards: Alſo becauſe the Defendant makes Conuzance and is ſtranger.

Secondly, if it be but forme.

And this Caſe was argued at Bench briefly, in Trin. 16. And I was of opinion, becauſe that this is the Conuzance of a Bayliff, and it is a diſcent in one blood, to which Dinham is a ſtranger, and becauſe that a good Iſſue might be taken thereupon as it is alledged; And if it had been a caſe of Baſtardy, the Jury might have tryed it, therefore it is good by the Common Law, and differs from a Formedon, for there he which brings it is privy, vide 41 Eliz. 13, & 14 in a Scire facias, good without ſhewing how, 33 H. 6. 34. Sir T. C. Caſe, 27 H. 6. 2. 4 E. 3. 43. vide 19 E. 3. Quare impedit 58. And if it were not good by the Common Law, yet it was but forme, and aided by the Statute of 27 Eliz. cap. 5. vide in Doctor Leiſeilds Caſe, lib. 10. fol. 94. And Juſtice Winch agreed with me, but Warburton to the contrary, and argued ſtrongly, that it was ſubſtance and was very materiall, and he relied upon the Book in the 38 H. 6. 17. and he put the caſes of 11 H. 6. 43. 8 H. 6. 22. & 2 H. 2. and Wimbiſh and Talbois caſe. Plowden. There is debate, and argued two againſt two, and no Judgment given, becauſe that it is not ſhewn Coment Coſin, vide 2 H. 5. 7. a good Iſſue, there is no ſuch Anceſtor, a generall Demurrer confeſſe not the matter, as in Debt upon a Bill, he plead payment and the Plaintiff demur, that Demurrer doth not confeſſe the payment. Lord Hobart would not ſpeak of the Common Law, but it ſeemed good to him by the Statute. The Title of the Act is, An Act for furthering of Juſtice, Definitive Juſtice, and Interlocutory. The Statute takes not away forme, but the

Whether Form or Subſtance.

the intrappings and ſnares of form: No place where the Obligation is made cannot be tried by them affirmatively. Hough and Bamfields caſe matter and no form, and ſo Dyer 319. But the point of Couſinage which comes by videlicet is form: And if the caſe of Wimbiſh and Talbois had been at this day it ſhould be aided, and Judgment for the Defendant.

Sheriff ought to deliver the Moyety by meets and bounds.

IT was argued by the Court that upon an Elegit the Sheriff ought to deliver the Moyety by meets and bounds, and if it be ſo that the Conuzor be Joynt-tenant, or Tenant in Common, then it ought to be ſo ſpecially alledged and contained in the return.

Paſch. 16 Jac.

Drury *verſus* Fitch.

Caſe. Hob. 219. Poph. Rep. f. 211.

DRury an Attorney of this Court, brought an action upon the caſe againſt Fitch, one of the Serjeants of London, for ſaying, *I arreſt thee for Felony*, and after not guilty pleaded the Plaintiff was Non-ſuited: And now it was moved that no coſts ſhould be given to the Defendant, becauſe that the words will not bear action, and therefore Judgment ſhall be given Quod nil capiat per billam: And they vouched one Preſident in Grewſtons caſe in Ban. Reg. viz. that now by the laſt Statute, coſts ſhall be given to the Defendant in all caſes where the Plaintiff ſhould have coſts if he recover; but in ſuch caſe where the Plaintiff if he recover ſhall not have coſts, the Defendant upon the Non-ſuit of the Plaintiff ſhall not have coſts.

Coſts upon Non-ſuit where the Plaintiff hath no cauſe of action.

But it ſeemed to Lord Hobart, that in this caſe the coſts are for vexation, and this is more vexation if he had no cauſe of action, vide 29 H. 8. fol. 32. It is there reſolved, that an action lies for the coſts, notwithſtanding a Writ of Error brought: And the laſt day of this Term the Court was of opinion that the action lies for the words, for it is more then theſe, *I charge thee with Felony*, and if the Action lies not, yet the Defendant ſhall have coſts, for it was ſuch an Action in which the Plaintiff ought to have coſts if he recover.

Cockes verſus Darſen. Hob. 29.

Upon motion in Court by the direction of Juſtice Warburton who had cauſed a Juror to be drawn, by reaſon of the ſlenderneſſe of the matter, and for avoiding the charge of a ſpeciall Verdict; the Caſe was, A Copyholder was a Lunatick, and the Lord committed the cuſtody of his Land to one which brought an Action of Treſpaſſe, and whether it ought to be brought by him or by the Lunatick was the queſtion. And the opinion of the Court was, that the Committee was but as Bayliff, and hath no Intereſt, but for the profit and benefit of the Lunatick, and is as his Servant; and it is contrary to the nature of his Authority to have an Action in his own name, for the intereſt and the Eſtate, and all power of Suits is remaining in the Lunatick: And it was ruled in this Court, that a Lunatick ſhall have a Quare impedit in his own name, vide Beverlies caſe, Coke lib. 4. the diverſity between a Lunatick and an Idiot, and H. 8. Dyer fol. 25. and though when Guardian in Socage (as it was adjudged) makes a Leaſe for years, his

Action brought by the Committee of a Lunatick which is a Copyholder, Poph. 141. 4 Rep. 126. Dyer. 302. b.

his Leſſe ſhall have an Ejectione firmæ, yet there the Guardian hath the Intereſt, and is accountable therefore. But in this caſe the Committee hath no Intereſt, but is as a Servant appointed by the Lord to keep the poſſeſſion for him, who is not able to keep it for himſelf. Lord Hobart and the Court alſo agreed, that the Lord of a Manno; hath not power to commit or diſpoſe of the Copphold of a Lunatick without ſpecial Cuſtom, no more then a man ſhall be Tenant by the Curteſie, &c. of a Copphold without Cuſtom, nor the Lord cannot commit during the minority of an Infant Coppholder without Cuſtom.

Lord can't commit Copyholds of Lunatick or Infant without Cuſtome.

Hill. 15. Jac. Rot. 926.

Smith *verſus* Stafford.

Brownlow.

Suff.

Caſe. Hob. 216.

ANdrew Smith and Anne his Wife, againſt Richard Stafford Executor of Jeremy Stafford in an Action upon the Caſe, the Plaintiff counts, that whereas there was communication had of a marriage between the ſaid Anne (when ſhe was ſole) and the ſaid Jeremy, the ſaid Jeremy in conſideration that the ſaid Anne would take him to her huſband, promiſed that if after the marriage the ſaid Jeremy died, living the ſaid Anne, he would leave the ſaid Anne worth a hundred pounds: and aver that ſhe did marry the ſaid Jeremy which died, and did not leave her worth a hundred pounds: And upon Non aſſumpſit the Jury found for the Plaintiff; and in Arreſt of Judgment it was alledged, that this intermarriage had extinguiſht the action, vide 11 H. 7. 4. 21 H. 7. 30. Coke 8. 136. there in Sir John Needhams caſe many caſes are put, vide Hoes caſe, that a Releaſe do not diſcharge Bail before Judgment, for it is contingent, vide one Judgment, Hill. 6 Jac. in the Kings Bench, Rot. 132.

Where intermarriage releaſe a promiſe made by the Husband to the Wife before marriage.

Thomas Belcher and Elizabeth his Wife, againſt Edmond Hudſon an Action upon the caſe, in conſideration that the ſaid Elizabeth at his requeſt would take one Thomas Maſon his familiar friend to her Huſband, he aſſumed and promiſed that if the ſaid Elizabeth ſurvived the ſaid Maſon, that he would pay yearly to her forty ſhillings for her maintenance, and ſhews that thereupon ſhe did take the ſaid Maſon to her Husband, and ſurvived him, and then married with the Plaintiff; the Defendant pleads a Releaſe from Maſon of all Actions, Demands, &c. and it was adjudged no ſufficient Releaſe: But Lord Hobart ſaid, that if he had releaſed all promiſes, that would have diſcharged the Defendant, vide 4 Eliz. Releaſe of all Actions, Suits, Quarrels, &c. doth not releaſe a Covenant before it be broken, but otherwiſe of a Releaſe of all Covenants, as it appears in Dyer 57. though the principal caſe was a releaſe of all Covenants until ſuch a day, and Covenants were broken before and not diſcharged, for it being broken before, there was no Covenant as to that.

Belcher and Hudſon.

Vide Lampets caſe, Coke lib. 10. 51. the reaſon of the Releaſe in Hoes caſe was, becauſe that it was contingent and uncertain, and 17 Eliz. a Leaſe to the Husband and Wife for life, the Remainder to the Survivor of them for one and twenty years, the Baron grant it over and ſurvive, yet it is void, becauſe it was contingent.

Adj. accord. Paſch. 1658. B.R. Lupart & Houblin. Vid. 2 Cro. 571. acc. Hetley 12.

And the Lord Hobart ſaid, that the promiſe was releaſed by the inter-marriage, and ſo ſhall be in the caſe of an Obligation, for Fortior eſt diſpoſitio legis quam hominis; and he held that ſtrongly to be Law, but Juſtice Winch and Juſtice Hutton held the contrary, and that the Law will not work a Releaſe contrary to the intent of the parties, and that the marriage (which is the cauſe) do not deſtroy that which it ſelf creates.

Trin. 6 Jac.

Jurden *verſus* Stone.

Gloceſt.

Hob. 181.

EJectment upon a Leaſe made by Alice Remington of a Copyhold in South Ceruy; Walter B. Copyholder in Fee married the ſaid Alice: And there was a Cuſtom in the Manno^r that the wife ſhall have the Copyhold as of a Franck-banck during her Widowhood, Si tam diu caſta viveret, and had uſed to challenge it, and the Lord granted it, as appears by divers admittances of women; and this wife after the death of her husband came into Court, and challenged her right of Franck-banck, and prayed to be admitted, and that the Steward refuſed, and ſhe made a Leaſe for one year to the Plaintiff; and if he might bring this Action by reaſon the woman was not admitted (for it was agreed that no Fine was due to the Lord) was the queſtion.

Where a woman may enter in and bring an action for her Franck-bank before admittance.

And upon the Evidence it was reſolved by the Court, that this Eſtate ariſeth out of the Eſtate of the Husband: And as Lord Hobart ſaid, it budded forth of the firſt Eſtate; and it ſeemed that where Tenant for life is admitted, that ſhall be the admittance of him in remainder: Alſo if the Freehold of the Copyhold be granted over, and the husband dies, there there cannot be any admittance, and yet ſhe may enter; and in this caſe if any admittance had been neceſſary, ſhe had done all that ſhe could do, and that amounts to an admittance in Law to an Eſtate created by the Cuſtom, and by the Act of God and Law. A Tenant alien, and the Feoffee tender the ſervices and gives notice, the Lord refuſe, this is ſufficient, and the Lord ſhall be compelled to avow upon him. Continual claim amounts to an entry.

Paſch. 16 Jac. Rot. 444.

Blands Caſe.

Caſe. Hob. 219. Words. Averment need not be. Adj. Tr. 1651. B. R. Smith & Rookes. Et M. 1657. B. R. Atkinſon & Witton.

GEorge Bland brought an Action upon the Caſe againſt A. B. the Defendant having ſome communication with one Eagle ſaid, that he was a troubleſome fellow, and he doubted not but to ſee him Indicted at the next Aſſiſes for Barretry, or Sheep-ſtealing as George Bland was, for George Bland was Indicted the laſt Aſſiſes for ſtealing of Sheep; and it was not averred that he was not Indicted, but that he was of good fame. It was moved in Arreſt of Judgment, that it is not actionable, and ſo was the opinion of the Court, for it is not a di-

rect

tes affirmative: Vide the caſe of Steward againſt Biſhop, before fol. 1. And if one ſays, I ſuſpect you for ſtealing my Horſe. And Judgment was given for the Defendant.

Trin. 16. Jac.

Darcy *verſus* Askwith. *Brownlow.*

Ebor.

JOhn Lord Darcy of Aſhton brought an Action of Waſt againſt Robert Askwith (now Knight) and John Marſhall, and aſſign the waſt in Woods, viz. In cutting down and ſelling two Oaks, four Aſhes in a Cloſe called Tiſley Cloſe, two Oaks in Parſons Croſt, one Aſh in Pindet Croſt, and ſixty one Oaks in Preſton Lands, and in diders other Cloſes in Swillington and Preſton: The Defendant plead a Leaſe of the Manor of Swillington to him for years, and alſo of the Mines, and juſtifie the ſhrowding of the Trees to make Punchons, Poles, and Stakes, and other Utenſils, in and about certain Pits called Cole-mines, in one of the Cloſes, without which the Defendants could not dig and take Coles out of the ſaid Pits; and aver imployment about the ſaid Cole-mines, and juſtifie the cutting of other trees for the making of Inſtruments, for the extracting of the water out of the ſaid Pits, and that without which they could not dig any Coles, and they were neceſſary for the digging of Coles, and for ſupporting the Pits, and aver the Imployment; And thereupon the Plaintiff demurred: And we all agreed that the plea is not good; Harris argued for the Defendant for three Reaſons. Waſt. Hob. 234. Waſt in cutting of Wood to make Cole-mines.

1. Becauſe by the Leaſe this was included, vide 21 H. 6. 61. grant of Comizance, &c. gives power to make a Steward, tempore E. 1. Fitz. 41. 2 B. 2. Bar. 237. grant to fiſh in a pond, yet he cannot make a trench. Perkins Grants 119.

2. The Coles are the Inheritance, and the bettering of them is the bettering of the Inheritance.

3. For the profit of the Common-wealth, 14 H. 8. 18. 20 Eliz. Dyer 361. Altams caſe, Trench to make a Meadow the better is no waſt, vide 22 H. 6. 6. digging of certain Loads of Gravel for the amending of the Land, vide 12 H. 4. 5. And for ſelling this ought not to be anſwered any other way then by juſtifying of the Imployment; and the Plaintiff may reply upon the ſale if he will, and the caſe is long debated, 5 E. 4. 10. vide Dyer 37. Malenders caſe.

And the laſt day of this Term, the Lord Hobart declared, that we were all of opinion that the Plea is not good, for there though the Leaſe be of Mines, and by vertue thereof the Leſſe might open new Mines, as in Sanders caſe, Coke lib. 5. fol. 12. there it ſhall be intended of new Mines which in themſelves is waſt, if it had not been by ſpecial words; And the digging of a Mine is an impairing of the Inheritance, and a great benefit to the Leſſe, and therefore if Leſſe for years build a new houſe, if he cut Trees off the ſame Lands for the making thereof, it is waſt, 17 E. 2. Fit. waſt 118. And no more then one may make a Brick kiln and burn Brick, or a Lime kiln and burn Lyme with Wood growing upon the ground, and ſell the Brick or Lyme, no more may the Defendants in this caſe cut down Wood for the making and

and ſupporting of theſe Mines for Coles which they ſell, vide 41 E. 3. 17. And ſo Judgment was given for the Plaintiff.

Edmonds Caſe.

Burglary.

MEmorand. That at the Aſſiſes holden at Wincheſter in Lent, 15 Jac. one William Edmonds was indicted of Burglary, becauſe that he Burglariter and feloniouſly did break the houſe of one Richard Heydon in the night at Ramſey, and the Jury gave a ſpecial Verdict. We find that Richard Heydon and Chriſtian his Wife were both in Bed and at reſt in an upper Chamber in the Manſion houſe of the ſaid Richard Heydon; and that the ſaid William Edmonds then was and yet is the Servant and Apprentice of the ſaid Richard, and that he then lay in another Chamber of the ſaid houſe, remote from the Bedchamber of his ſaid Maſter and Dame, and that there was a Door with a Latch at the Stairs-foot of the ſaid Bed-chamber of the ſaid Heydon, but none at the Stair-head, being the entrance into the ſaid Bed-chamber of the ſaid Heydon: We find that the ſaid William at the ſaid time in the Indictment drew the Latch of the Stair-foot Door, and opened the ſaid Door being then latched, and went up the Stairs, and entred into the Bed-chamber of his ſaid Maſter, with an intent to murther the ſaid Heydon, and that he did then and there with an Hatchet (with an intent to murther his ſaid Maſter) ſtrike and grievouſly wound him, and gave him fifteen wounds on the head, and other parts of his body: And if upon the whole matter, &c.

Servant draws the Latch of his Maſters Bed-chamber, and enters with intent to kill, and wound him.

And this ſpecial Verdict was ſhown by the Lord Chief Baron Tanfield, unto all the Judges of Serjeants-Inne in Chancery-Lane, viz. Juſtice Warburton, Crook, Baron Bromely, Juſtice Dodderidge, Houghton, Winch, and Hutton; And they all (beſides Winch which doubted) agreed that it was Burglary, and afterwards in the ſame Term, at a meeting in Serjeants-Inne in Fleetſtreet, it was ſhewn to Montague, Hobart, and Denham, which concurred.

Vid. 3. Inſt. 5. acc.

Mich. 16 Jac.

Staffords Caſe.

Matter of Record tried by the Country. Hob 244. 1 Leon. 229.

FAlſe Impriſonment was brought againſt Sir John Stafford, where the Defendants juſtifie, that Briſtoll is an ancient City, and that time whereof memory, &c. there hath been a Court holden there before the Sheriffs, &c. and that there was a Plaint levied, and Judgment, and that the now Plaintiff was taken in execution. The Plaintiff replyed Quod non fuit aliqua querela levata, according to the cuſtome, and requires this Quod inquiratur &c. And it was tryed at Briſtoll and found for the Plaintiff, and damages twenty ſix pounds. And it was moved in Arreſt of Judgment, that this being matter of Record, viz. the entry of the Plaint in a Court of a Record, it ſhall be tryed by the Record, and not by the Country.

And it was adjudged that the tryal was good, becauſe that it is not

not mark'd Record, but whether it was according to the Cuſtom. And Non proſecutus eſt ullum breve is triable by the Country; Quære, if the King grant by Patent to hold plea under forty ſhillings, if it be a Court of Record.

Sir Walter Rawleys Caſe.

MEmorand. that on Friday the 23. of October, upon conference between all the Juſtices of England, whether a Privy Seal was ſufficient, it being directed to the Juſtices of the Kings Bench, to command them to award execution againſt Sir Walter Rawley (which was attainted of Treaſon at Wincheſter, Mich. 1 Jacobi, before Commiſſioners of Oyer and Terminer) or how they ſhould proceed before execution be awarded: It was reſolved by all, that he ought to be brought to Bar by Habeas Corpus by the Lieutenant of the Tower, and then demanded if he could ſay any thing why execution ſhould not be awarded, for the proceedings againſt him being before Commiſſioners, they are delivered only into the Court of Kings Bench, or they might have remained in a Bag or a Cheſt, and no Roll made thereof, and ſo long time paſſing, it is not a Legal courſe that he ſhould be commanded by a Privy Seal, or great Seal to be executed, without being demanded what he hath to ſay, for he might have a pardon, or he might ſay, that he is not the ſame perſon: As if one be Outlawed of Felony and taken, he ſhall not be preſently hanged, but he ſhall be brought to Bar and ſo demanded, &c. And upon this reſolution a Privy Seal came to the Juſtices of the Kings Bench, commanding them to proceed againſt him according to Law: And thereupon a Habeas Corpus was awarded, and Octob. 28. he came to the Bar, being brought by the Lieutenant, and there he was demanded of whether he had any thing to ſay why, &c. and there he ſhewed, that the King had employed him as General of a Voyage, and hath given him power De vita & membris upon others: And whether this did amount to a pardon or no, he knew not. The Attorney-general ſaid, that the King pardoned no Treaſons by any Implication, but it ought to be by ſpecial words: Then he ſaid, he had nothing elſe to ſay, but ſubmit himſelf to the mercy of the King; And there execution was awarded, and a Roll made thereof (and ſo it was done in Lepu's caſe, as the Preſident was ſhewn) and he was committed to the Sheriffs of London and Middleſex, and by them he was brought to the Gate-houſe, and the next day (which day the Lord Mayor of London came to Weſtminſter to take his Oath) he was beheaded at the great Court at Weſtminſter, and he died in a good and religious manner, and ſpake much without any fear of death, ſubmitted himſelf to the Block, and by his death gained great reputation in this life, and by the grace and mercy of God remiſſion of his ſins, and eternal life afterwards, &c.

How Priſoners which are attainted of Treaſon, and ſet at large, ſhall be brought to execution.

Execution.

Treaſon not pardoned by Implication.

Biſhop and Others.

Lineal Warranty.

FAther Tenant in tail hath Iſſue two Sons, the Father with the eldeſt Son makes a Feoffment with Warranty, the eldeſt Son dies, and after the Father dies, the pounger Son brought his Formedon; and this Feoffment with warranty of the eldeſt Son is pleaded in Bar, and upon Demurrer, Judgment for the Demandant: For it is but a lineal Warranty, and then without Aſſets it is no Bar, for though the eldeſt die in the life of the Father, yet the pounger Son by poſſibility might have the Land as Heir to him.

Mich. 16 Jacobi.

Coſts ſhall not be allowed upon a Non-ſuit in an Action brought upon the Statute 5 *Eliz.* of Perjury.

AN action of Debt was brought upon the Statute of 5 Eliz. for perjury againſt one that was produc'd as a Witneſs in action of Treſpaſs, and depoſed falſly: And upon Nil debet pleaded, the Plaintiff was non-ſuit; And whether the Defendant ſhould have coſts or no, was moved by Serjeant Harvy, and that ſtands upon the words of the Statute of 23 H. 8. cap. 16. the words are, In any Action, Suit, Bill, upon the Caſe, or upon any Statute for any Offence, or wrong perſonal immediately ſuppoſed to be done to the Plaintiff.

The Opinion of the Court was, that the Defendant ſhould not have coſts upon this non-ſuit, becauſe that this Action is founded upon a Statute made long after the making of that Statute. Alſo this is not an immediate wrong to the Plaintiff, but ſecondarily, for it is an immediate wrong to the Truth; and ſuch Statutes which are intended by this Act, ſhall be like to Treſpaſs done to the party himſelf, as Raviſhment of Ward: Alſo it is not aided by the Statute of 4 Jacobi cap. 3. for that gives coſts to the Defendant, where the Plaintiff ſhall have coſts if he recover; And Mr. Brownlow the Prothonotary ſaid, that it had been ruled ſo before, for the Plaintiff ſhould not have coſts if he recover, becauſe the Act 5 Eliz. gives a Penalty, viz. a forfeiture of twenty pounds againſt the Witneſs, and forty pounds againſt the Suborner, and ſo the Plaintiff if he had recovered, ſhould not have had any coſts, and therefore it is not aided by the Statute of 4 Jacobi.

Mich. 16 Jacobi.

Conesbies Caſe.

Prohibition. Hob. 247. to Spiritual Court.

THe Lady Conesby, being the wife of Sir Ralph Conesby, was cited in the Eccleſiaſtical Court by Mr. Watts, who had married Elizabeth the Grand-child of the Father of Sir Ralph, to which Grand-child by Will one Legacy of an hundred pounds was deviſed, and that was paid 3 Jac. by the Lady Conesby Executor of the firſt Teſtator,

and

and upon payment an Acquittance under the hand and ſeal of the ſaid Wats was, &c. in the preſence of two Witneſſes now dead: And this being denied, and they allowing of no proof by compariſon of hands, nor by circumſtances but only proof of them which wrote it, or of them which ſaw them ſubſcribe: And by their Law an Acquittance of the Husband for a Legacy to the wife, without the wife is not ſufficient; alſo if Wats himſelf will deny it upon his Oath, there it ſhall ſtand againſt all proofs: A Prohibition was granted upon the motion of Serjeant John Moore, and after Serjeant Harvy had ſaid all that he could ſay.

Refuſing competent proof, Witneſſes being dead.

Vid Hob. 188.

Trin. 16 Jac. Rot. 954.

Kind *verſus* Ammery.

KInd, Plaintiff in a Replevin againſt Ammery: The Avowry was for a Rent-charge, and the Grant was a rent of twelve pounds payable at two Feaſts, and if it be behind for the ſpace of a month after any of the ſaid Feaſts, it being lawfully demanded, that he might diſtrain; and for Rent arrear at the Annunciation, and by the ſpace of a month after, and not paid, he diſtrained: And the Plaintiff demurred upon this Avowry, and ſhews for cauſe, that it is not ſhewn that the Avowant made any demand before the Diſtreſs: And Serjeant Harris relied upon a Caſe which was An. 31 Eliz. as he ſaid, and vouched the number Roll; that upon demurrer between Boſden and Downs, there the Avowry was not good for the ſame cauſe: And Maunds caſe, Coke lib. 7. fol. 28. implies that it ought to be demanded, but it is not iſſuable, if it be at the day or after: And he ſaid it was debated 31 Eliz. whether it was form or ſubſtance, which ſhall not need to be ſhewn upon Demurrer; But the Court agreed that no actual demand was neceſſary to precede the Diſtreſs in this caſe, but that the Diſtreſs is a demand. But if the Grant had been penned in this form, if it be arrear at ſuch a Feaſt, and for a month after demand, that then he may diſtrain, otherwiſe it is, for there the Diſtreſs is limited to the month after the demand: And ſo it was adjudged in this Court, between Coppleſton and Langford, Trin. 3 Car. Rot. 2865.

Replevin.

Demand, not neceſſary in an Avowry for a Rent-charge.

Boſdens caſe. Vid. Hob. 208. 207. 82. 135. 133.

Vid Plow. 71. Dyer 31. b. 1 Inſt. 144. 202. March. 149. Vid. apres 42. 114.

Coppleſton and *Langford.*

Replevin between Beriman and Bower, Avowry for Rent granted out of ten acres of Land in Crediton, payable at ſuch a Feaſt upon the Town-ſtone, upon the Key in Barnſtable, if it be lawfully demanded, with clauſe of Diſtreſs, and the Diſtreſs was before demand; and upon demurrer it was reſolved a good Diſtreſs without demand, vide Dyer 348.

Booton againſt the Biſhop of Rocheſter.

Inſufficient return on a Writ in a *Quare Impedit* to the Archbiſhop.

A Quare Impedit was brought by Booton againſt the Biſhop of Rocheſter, who pleads, that he claims nothing but as Ordinary, and yet pleads further, that the Clerk which the Plaintiff preſent, had before contracted with the Plaintiff Simoniacally, and therefore becauſe he was Simoniacus he refuſed him, and that the Church was then void, and ſo remained void, whereupon the Plaintiff had a Writ to the Archbiſhop of Canterbury, who returned that before the coming of this Writ, viz. 4 July, the Church was full of one Doctor Grant ex collatione of the ſaid Biſhop of Rocheſter, which had collated by Laps, and this return was adjudged inſufficient: Firſt, it is clear, that though the ſix months paſs, yet if the Patron preſent, the Biſhop ought to admit, although it be after the title devolved unto the Metropolitan: And it ſeems alſo reaſon that he ought to admit, though that the Title by Laps be accrued to the King, for he claims it as ſupream Ordinary, vide Dyer 277. quære. But in this caſe the Biſhop which is the Defendant is bound by the Judgment, and the Writ is, notwithſtanding the claim of the Biſhop, that he admit the Clerk; and the Biſhop is but Servant, and ought to execute the proceſs of the Court. It was urged by Serjeant Henden, a Canon, Lindwood ſol. That if the Church be vacant when the Writ comes to the Biſhop, that he is bound to execute the Writ, but if it be full, then he certifies the Juſtices: And the Archbiſhop is ſworn to the Canons, and he vouched 22 H.6.45. Coke lib.6.49. and 52 Dyer 260. F.N.B.47. Dyer 364. 14 H.7.22. 34 H.6.41. 9 E.3. Quare non admiſit, 18 E.4.7.

Patron may preſent after Lapſe.

Trin. 16 Jac. Rot. 1999.

Eire *verſus* Banneſter.

Challenge.

By ſurmiſe of the Pl. that he is a kin to the Sheriff.

Defendant denies it by plea, and after Challenges the Array.

JOhn Eire brought an Ejectione firmæ upon a Leaſe made by Sir Edward Kinaſton againſt Andrew Banneſter and Thomas Wenlock, of Land in Norwood, and after Not guilty, the Plaintiff made ſurmiſe of kindred to the Sheriff Sir Thomas Owen to the Plaintiff, the Defendant pleads, that the Sheriff Non eſt de conſanguinitate of the Plaintiff, as he by his challenge ſuppoſed: And becauſe the Defendant denied the ſaid Challenge, John Eire calumnia illa non obſtant. prec' eſt quod ven. fac', &c. And at the Niſi prius the Defendants challenge the Array for conſanguinity between the Sheriff and the Leſſor, viz. Sir Edward Kinaſton, and made this Averment, that the Sheriff had Iſſue by Suſan, which was the daughter of Judith, the wife of Sir Edward Kinaſton; and conclude it is a principal Challenge, and thereupon the Plaintiff demurred: And it was returned upon the Poſtea, and it ſeems that the Sheriff being admitted and allowed to be indifferent by the Defendants in the ſame Plea, they which allow cannot have a Challenge to the Sheriff, for the Defendants might by confeſſion of the ſurmiſe of the Plaintiff to be true, have had a Writ directed

directed to the Coroners, and although the entry is Calumnia illa non obſtant: that is the form of the Award, and if he ſhall be allowed otherwiſe afterwards to challenge the Array, then it would be infinite.

As a man ought to alledge but one principall Challenge, though he hath many, ſo it ſhall be peremptory to the Defendant, and when he allows the Sheriff indifferent, that ſhall be taken to be for all cauſes precedent, unleſſe it be of latter time: And ſo is the opinion of 20 E. 4. 2. And if there be many Defendants, if one challenge the Array, that ſhall be peremptory for the others, as it ſeems; for the others ought when they challenge the Tales to ſhew cauſe preſently of the Challenge, for if it be quaſhed that ſhall alſo be againſt them, vide Dyer 201. in Attaint vide 36. H. 6. 21. that where one challenge the Array which is affirmed, the other Defendants after may challenge the Array of the Tales.

The ſecond point is, if it be a principall challenge or no, by reaſon that the Leſſor is not party to the Action, vide 10 E. 4. 12. 15 E. 4. 18. and 21 E. 4. 61. there it ſeems that where the Defendant juſtifies as Servant to I. S. and that the Land is his Free-hold, it is a principall challenge that a Juror is within the Diſtreſſe of John S. for the Title is to be tryed: And now it was found by common experience that the Leſſee is but Servant; common recoveries at this day are but as other common Conveyances.

But it ſeems that the Law is contrary, and it is not averred that this is a Leaſe for trying the Title; and (as Judges) we take no notice thereof, but vide 3 H. 7. 2. contrary to the 10 and 15 E. 4. where the Challenge is to the Array, becauſe that the Sheriff was of kindred to him whoſe Free-hold was in Iſſue; and vide 9 H. 7. 22. Cognizance as Bayliff to the Abbot of Ramſey, Challenge to the Array, becauſe the Sheriff was within the Diſtreſſe of the Abbot, and that was not a principall Challenge by Fineux, Brian, and Vavaſor, becauſe that he was not party to the Writ, vide this very Caſe, Dyer 300. Leſſor of the pl. of kindred to the Sheriff.

And upon argument at the Bar the Court was of opinion, that it was no principall Challenge, but ought to have concluded with the favour. All agreed that a Surmiſe which is for prevention of delay, ought to contain matter which is a principall Challenge, for no triall ſhall be of ſuch ſuggeſtion, but by the deniall of the Defendant or Confeſſion: And by the opinion of Lord Hobart and Juſtice Winch ceſt. dedire n'eſt peremptory to the Defendant, for his time of challenge is not till the Jury come to be ſworn; but I hold the contrary becauſe that he might have confeſſed the Surmiſe, and ſo have had time: And I rely upon 20 E. 4. 2. there in the end of the Caſe it is ſaid, that the Defendant by his deniall, where he ſaies that the Sheriff is not favourable, but indifferent, there he ſhall never have a challenge for favour unleſſe he ſhews cauſe of later time. Dyer 300.

As to the ſecond Point, it is no principall Challenge, becauſe it might be, that the Leſſor had granted over the Reverſion, or that the Defendant might be found Not guilty: And a principall Challenge ought to contain ſuch matter, which (being ſo) the Law adjudge favourable; and in this very caſe two Preſidents ſcil. Judgments more ſtrong then in this caſe, Hil. 44 Eliz. Rot. 1208. Bedforne againſt Dandy in an Ejectione firmæ upon a Leaſe made by Sir John Digby, after Not guilty pleaded a Surmiſe made of conſanguinity between the Bedforne and Dandy.

Lessor and the Sheriff, &c. confessed, and thereupon a Venire facias to the Coroners, and after the Challenge was adjudged insufficient, and a Venire facias likewise to the Sheriff was ruled, Trin. 14 Jac. Rot. 2284. Craddock against Wenlock, in an Ejectione firmæ upon a Lease made by Sir Robbert Cotton, such Challenge and Award to the Coroners, and tryed and adjudged a mis-tryall; and a Venire facias awarded to the Sheriff, and the mis-tryall is not aided by the Statute, vide Coke lib. 5. Bainhams case: And so by the Judgment of the Court this Challenge was insufficient; and Warburton being then sick was of the same opinion, as he told me vide 8 Eliz. Dyer 281. Austen and Baker in Attaint, vide 33 H. 6. 21.

Craddock and Wenlock.

In Lord Brooks c. B. R. Tr. 1657 Glyn said it was now a principall Challenge.

3. Defendants, one challenge the Array of the Principall, and that being affirmed the other Defendants challenge the Tales.

Tr. 63. B. R. Duncomb versus Ingleby, after Verdict adjaccord.

Mich. 16 Jac.

Easington *versus* Boucher.

Debt.

Hob. 244. Severall Defendants in Debt upon a joynt Contract may plead severall pleas in barr, but not dilatory.

EAsington brought an action of Debt upon a joynt Contract against Sir John Boucher, Turner, Bolder and one other; Turner appear and tender his Law, Sir John Boucher and another plead Nil debent, and the other was Outlawed, and it was said, that he ought to have joyned, but it was resolved by the Court that they may sever in Bars, but ought to joyn in Delatories; For otherwise if one which never bargained be joyned in the action, he must put his matter upon their pleadings. And in Debt upon a joynt Obligation, one may plead a Release, the other Non est factum, vide 48 E. 3. 21. and vide Presidents in this case according to this resolution, Trin. 26 Eliz. Rot. 821. Sabud against Robinson, Matson, and Loughton, and Count sur emisset, Waston and Loughton pleaded, and Non sum informatus by Robinson, Sed judicium inde cesset quousque, the Issue be tryed, and Venire facias awarded and found for the Plaintiff Hil. 41 Eliz. Rot. 455.

Sabud versus R. W. L. Trin. 26. Eliz. Rot. 821.

Priam & T. P. H. P. & I. P.

John Periam and Margaret his wife, Executors of John Hart brought an action of Debt upon Emisset against Thomasin Phelpes Widow, Henry Pittard, and John Phelpes: John Phelpes was Outlawed, and Judgment against Henry P. by Non sum informat. and Thom. P. plead Nil debet, Venire facias, and Judgment respited quousq; &c. and after tryall the Plaintiff had Judgment.

Fleet and Harrison.

Hil. 13 Jac. Rot. 841. Fleet brought an action of Debt against Ja. Harrison, and Isack. Brooke upon Emissent: And James H. waged his Law, & Judgment against Isac. Brooke by nihil dicit. Et quia Conveniens est quod judicium de loquela prædicta unicum sit versus prædictos Isaac. & Jacobum si contingat ipsum Jacob. de perficiend. legem suam prædictam deficere, Ideo parcatur judicium inde versus præfatum Isaac. reddendum quousque prædictus Jacobus legem prædictam perficeret, sive inde deficeret, & postea prædictus Jacobus Persecit legem suam, Ideo consideratum est per Curiam quod prædictus querens nihil capiat per breve suum prædictum sed sit in misericordia pro falso clamore suo inde, & quod prædictus Jacobus eat inde sine die. And according to this President it was agreed per Curiam that so it ought to be.

V. 1 Bul. 194. wager for part, and plead to part.

Hil.

Hil. 12 Jac. Rot. 3007.

Reyner *verſus* Waterhouſe.

Ebor.

Caſe.

JOhn Reyner brought an action upon the caſe againſt L. Walterhouſe, and declares, that he is, and by the ſpace of twenty years paſt hath been an Inhabitant within the Town of Long Leverſeidge in the Pariſh of Burſtall: And the Inhabitants of Long Leverſeidge aforeſaid, De tempore cujus contrarii memoria hominum; &c. uſed to have a common way as well for Foot-men as for Horſe-men, to go and ride from the ſaid Town of L. to the Pariſh Church of Burſtall aforeſaid, on Lords daies, and Feſtivall daies, and other convenient times to hear Divine Service within the ſaid Church; and to carry bodies, &c. dying in the ſaid Town, to the ſaid Church to be interred, Modo & forma ſequent. viz. &c. and ſhews the way through divers Cloſes in Long Leverſeidge, Little Leverſeidge, and Gomerſall, and over the Church-yard of the Church of Burſtall, and from thence unto the Church aforeſaid, and backward, &c. and ſhew a diſturbance made by the Defendant by making of a Ditch in one of the Cloſes in Gomerſall, the Defendant pleaded Non culpab: and found for the Plaintiff; and in Arreſt of Judgment it was alledged that the Venire facias fuit de Gomerſall tant. And the Venire facias was quaſhed per Curiam, and a new one awarded de L. L. G. & Burſtall.

Vin. fac. de diverſis villis.

V. apres 39.

Hil. 16 Iac.

Bigg *verſus* Malin.

BIgg brought an action upon the Caſe againſt Malin, as Adminiſtrator, and counts that whereas the Inteſtate was indebted to him in ten pounds, and the Defendant alſo was indebted to him in forty ſhillings, they accounted, and upon account the Debt being twelve pounds, the Defendant being Adminiſtrator did aſſume and promiſe to pay it, Et licet ſæpius requiſitus non ſolvit: And upon Non aſſumpſit pleaded, the Verdict was found for the Plaintiff: And by Finch, it was moved in Arreſt of Judgment, that the Plaintiff had not ſhewn in this Count ſufficient conſideration to charge the Defendant, becauſe that it doth not appear that the Defendant hath Aſſets. But the Court diſallowed that, for if that were neceſſary it ought to be præſumed to be found in the Verdict; As in the caſe, in conſideration that the Plaintiff had ſold and delivered to him twenty quarters of good and merchantable Barly, the Defendant promiſe to pay him

Caſe.

In caſe upon Aſſumpſit a. gainſt Executors, it is not neceſſary to alledge Aſſets.

V. apres 108.

him twenty pound: Non Assumpsit, the plaintiff ought to prove the promise and the delivery. And as in Debt against Executors upon a simple Contract, it shall not need to be alledged that they had Assets to pay Debts by specialties, yet good, and that ought to be proved.

Promise per Executors with and without assets.

But it seemed to be agreed, that if an Executor or Administrator which hath not Assets, makes promise of payment, if it be not mixed with any profit to himself, viz. forbearance, &c. there it shall not charge him.

But by Warburton, if an Executor hath fifty pounds Assets, and he promise to pay to a Creditor a hundred pounds, that shall bind him for all, for when he hath Assets for part, the Plaintiff hath Judgment for all, and execution only for so much as is found. And in this case the Plaintiff had Judgment.

Brook *versus* Groves.

BRook brought a Quod permittat against Groves, and after Imparlance the Defendant demanded the view, and rule by the Court that he might, and vide 34 H. 6. 9. 10. accordant, vide 6 E. 4. 1. and the Plea viz. the View was De tenementis prædictis, which was as well of the Lands to which the Nusance, as of the Lands which was the Nusance: And the View in this action is but for fifteen daies.

Quod permittat

View.

Egerton *versus* Egerton.

THe Lady Egerton Wife of Sir John Egerton, brought a Writ of Dower against Edward Egerton, the Tenant at the day of Essoin did not cast any Essoin: And the Demandant entred her exception, & at that time the Writ was not returned, and upon motion to the Court for the tenant to be essoined notwithstanding the exception, it was resolved that notwithstanding the writ was not returned, yet the Tenant might have his Essoin, vide 2 E. 4. 11. 21 E. 4. 7, 8 30 H. 6. 1. that an Essoine may be before the Writ be returned, and vide 2 H. 7. 4. 10 E. 4. 4. the Tenant may be Essoined at any day, as well at the fourth day as the day of Essoin unlesse the Essoin be challenged, viz. an exception entred, and 2 H. 7. 4. takes a difference between a reall Action, or Originall Suit, and a Writ of Execution; for upon the first, the Essoin lies at any time before the fourth day, but in the Writ of Execution the Defendant ought to be essoined at the day of the Essoin.

Dower.

Essoin though the Writ be not returned.

And Warburton said, that if the Essoin be not cast before the return of the Writ, it ought not to be at all, for all Writs come in by Post diem.

Cardinals

Cardinals Caſe.

CArdinal an Attorney of this Court of Common Bench, brought an action upon the caſe againſt I.B. for ſaying of him, That he had forged the laſt Will of I. S. and after Iſſue upon not guilty, it was found for the Plaintiff; And moved in Arreſt of Judgment, that it is not alledged that the Will is ſuppoſed to be forged. But by the Court, that was neceſſarily implyed, and the Plaintiff had Judgment. Caſe. Words. Forged a Will.

Paſc. 17 Jac.

Allaboyter *verſus* Clifford.

Suff.

JOhn Allaboyter brought an Action of Debt upon an Obligation againſt Daniel Clifford, which was with a Condition, that if the Defendant perform the Award of two Arbitrators of all Actions, Demands, &c. moved betwæn the Plaintiff and Defendant from the beginning of the world until the day of the date of the Obligation, ſo that the arbitrement be made before the tenth day of December; the Defendant plead no ſuch award before the day, the Plaintiff reply and ſhew, that the Ninth day of December they awarded of and upon the premiſſes, and arbitrated that the Defendant ſhould pay to the Plaintiff fourtæn pounds at two ſeveral days, and that upon the laſt day the Plaintiff ſhould make a general releaſe to the Defendant, and the Defendant likewiſe to the Plaintiff, and alledge a breach for the non-payment of the firſt ſeven pounds, and aver that the fourteen pounds was awarded to the Plaintiff, in full ſatisfaction of all ſuits, quarrels, &c. depending between the Plaintiff and the Defendant, at any time before the date of the Obligation, upon which Plea the Defendant demurred, and objected by Attho, that the Releaſe which is appointed to be made upon the laſt day, is not appointed but after the payment of the money, and alſo is then to be made of more then is ſubmitted to them. But by the Court it is agreed to be a good Award, for it ſhall not be intended that there were more matters ariſing between them after the date of the Obligation: Alſo if he had made a Releaſe until the date of the Obligation, that were a good performance. And this Caſe had been adjudged before between Nichols and Grandie. Debt. Arbitrement. Releaſes. *Nichols* and *Grandy*.

George Andrews Case.

The Custome of *London* to give security for the payment of the Portions of Orphans, and upon refusal the Debtors are to be committed.

UPon a Habeas Corpus, one George Andrews was brought to the Bar, and upon a long return by the Mayor, Aldermen, and Sheriffs of London, of their custom concerning the Orphans of Freemen, and for the security of their Portions to be paid to them at the age of 21. years, or at the time of their marriage, or at such time as is appointed by the Will of their Father, or Mother, or other Freemen giving to them any Legacy, they use to take sufficient security of them which ought to pay them, and if they refuse, then to commit them to the Counter until they give security; and that their customs were confirmed by Act of Parliament, An. 7 R. 2. William Andrews a Freeman having one Son and one Daughter by Emery his Wife died, this George Andrews a Freeman being Suitor to the Wife before marriage agreed, that if the Wife would marry him, she should dispose of two hundred pounds, &c. and he was bound in a Statute to permit and suffer her to make her Will, and dispose thereof; and after she died, and by her Will gave a hundred pounds to her Son, and a hundred pounds to her Daughter, and the said G. A. agreed to her Will, and yet refused to give security to the Chamberlain of London to pay it at the day appointed by the Will, pretending that he was bound by Statute to the Friends of the Orphans to perform it: And by the Court he was remanded, for it is a laudable custom, and the voluntary Obligation upon marriage is not any discharge as to the security by the custom, and we will not disparage the Government of the City.

Hob. 247.

Londons Government approved.

Trin. 16 Jac.

Wolfe *versus* Heydon.

London.

Debt.

To what intents a man shall be said Executor before he prove the Will.

THomas Wolfe Administrator of the Goods and Chattels of John Aldrich, durante minore ætate of Edward Aldrich, William Aldrich, and other children of the said John not administred by John Talbot, Executor of John A. or by Robere Armiger late Administrator of the said Goods and Chattels during the minority of the said children not administred, brought an action of Debt against Simon Heydon, and count upon an Obligation of fifty pounds, whereof ten pounds was satisfied to John Aldrich in his life, and counts that John Talbot was made his Executor and died; and that the money was neither paid unto the said John Aldrich the Testator in his life, nor to John Talbot the Executor in his life, nor to the said Robert Armiger late Administrator of the Goods and Chattels of the said John Aldrich, during the minority of the children; and he produce Letters of Administration, and aver that the Children were within the age of seventeen years. The Defendant plead in Bar, that the said Aldrich before this Writ purchased, viz. such a day at S. in the Parish, &c. made his Will and constituted John Talbot his Executor Qui suscipit onus inde, and administred divers Goods as Executor, and after, viz. such a day, the said John Talbot made Benjamin Roblet his Executor, and died, and

Roblet

Roblet ſuſcepit onus teſtament. and did adminiſter, and demand Judgment ſi actio, &c.

The Plaintiff reply and confeſs that John Aldrich made John Talbot his Executor, and that he adminiſtred and made Roblet his Executor: But he ſays, that the ſaid John Talbot did not prove the Will of the ſaid John Aldrich according to the Eccleſiaſtical Law; and that the ſaid Benjamin before that he took the charge of the Teſtament of John Talbot renounced before the Ordinary to be Executor of the ſaid John Aldrich, or to adminiſter any of the Goods which were the Goods of the ſaid John Aldrich, or to have any thing to do therewith: And thereupon the Demandant demurs, and Judgment was given for the Plaintiff.

And in this caſe the Court well agrees with the replication, for he was Executor before probate, to pay Debts and to be ſued, but not to have an action, though that originally the probate was temporal: and it is no plea in our Law, ſcil. that he did not prove the Will, but that he was not Executor: And of late times our Law for the encreaſing of the credit, and for the inforcing of the Probate, do diſallow actions brought before the Probate, vide the Caſe upon which it was principally inſiſted, 22, 23 Eliz. Dyer 272. a. Iſted againſt Stanley; If an Executor dies before Probate, and if the reſidue of the Goods be deviſed to him, then Adminiſtration ſhall be committed to his Executor, or otherwiſe to the next of the blood of the firſt Teſtator, for now he dies inteſtate: And although it be one dying inteſtate of the firſt Teſtator in Law, yet it being the real and ſpecial matter it agrees well with his Writ, and is matter in Law, ſcil. to ſome purpoſes he dies inteſtate, and to others not, for he had power to releaſe, to pay Debts, and to take a releaſe, vide Dyer 367. a. It ſeems that his Executor ſhall have his Legacy. But the Count is cumbred with the Adminiſtration committed to Armiger, and it doth not appear how it was diſcharged, for it is only that the money was not paid to him late Adminiſtrator, and it is good, and the action is brought according to the Letters of Adminiſtration to him, which were of the goods not adminiſtred by John Talbot, nor by Armiger which was Adminiſtrator. Adminiſtration.

Coppledick *verſus* Tanſey.

Linc.

FRancis Coppledick Plaintiff in a Quare impedit againſt Samuel Tanſey Clerk, Sir Philip Tirivint Baronet, and Richard Biſhop of Lincoln, Quod permittant ipſum preſentare ad Eccleſiam de Ulceby; and count that one Francis Coppledick was ſeiſed of the Advowſon in Fee, and that it was holden in Socage; And that the ſaid Francis ſo being ſeiſed deviſed it in tail, and intitle himſelf as Heir in tail. *Quare impedit.* Trial where no ſuch Town is pleaded.

Tanſey plead that he is Parſon imparſonee of the preſentment of the ſaid Sir Philip, and demand Oyer of the Writ, and plead that at the day of the Writ purchaſed there was no ſuch Richard Biſhop of Lincoln in rerum natura, and demands Judgment of the Writ: Sir Philip plead that there is no ſuch Church called Ulceby in the County of Lincoln, and demanded Judgment of the Writ.

The Plaintiff demur upon the plea of the Incumbent, and as to the plea

plea of Sir Philip, he reply, that there is ſuch a Church called Ulceby in the County of Lincoln; and this plea being tried at Lincoln, before Baron Bromley, it was found for the Defendant: for there was an union of the Church of Fordington to Ulceby, and it was called Ulceby cum Fordington: And it was ſaid that Inſtitutions and Preſentments were to Ulceby; and Ulceby was the greater, and Fordington was the leſſer Church, and united, and therein had loſt its name. It was agreed, that it being known by the one or by the other name, had been ſufficient to have found for the Plaintiff.

Known by one name or another, good Evidence to prove either.

Serjeant Harris moved in Arreſt of Judgment, that it being tried Per Venire Facias de vicineto de Ulceby, it was miſ-tried, for when Nul tiel Vill. is pleaded, it ſhall be tried per Corpus Comitatus, 8 H. 6. 38 H. 8. & 24 E. 4. 4. Fitz. viſne 27. And he vouched 45 E. 3. 6. where ſuch an Iſſue was tried, but it did not appear how the Venire was awarded. And at the firſt time of this motion it appeared, prima facie, to be a miſ-trial.

Venue ſur nul tiel Vill.

Bawtry at another day moved it, and ſaid, that the Writ is Quod permittant preſentare, to the Church of Ulceby, and the Count according therewith, it is to be intended a Town or Pariſh: And he reſembled it to the caſe of an Appeal againſt one by the name of I. S. of Dale, Carpenter, and he traverſed that he was not dwelling at Dale, and it was a good trial from Dale: And of, in, and at, are all one; but ſaid, that in the Count it is ſaid, that Edward Coppledick died at Ulceby: And all the Court agreed that it is a good trial, and that it is admitted that there is ſuch a Town, and the Writ implies it: And Judgment for the Defendant.

Of, in, and at, all one.

Smith *verſus* Liveſey.

A Scire Facias againſt Michael Liveſey late Sheriff of Kent, by Smith, reciting, that whereas he had recovered a hundred pounds againſt Sir Richard Potham, and had ſued a Scire facias, the Defendant being Sheriff, returned that he levied ſixty and three pounds which he had ready at the day, and yet he did not bring the moneys into Court; and after he was removed de ſon Office, and to know why he ſhould not have Execution againſt him of the ſaid ſum, with which he had charged himſelf by his return; and the Defendant demurred, and upon reading of the Record, Judgment for the Plaintiff, according to the caſe, 9 E. 4. 50. vide F. N. B. 165. 34 H. 6. 36. a. and 5 E. 3. 53. Fitz. Execution 101. And between Richards and Speak, it was adjudged in this Court, that Debt lies againſt the Sheriff, that hath charged himſelf by his return, that he hath levied the money.

Scire facias.

Scire facias againſt a Sheriff to have execution againſt him of money returned levied by him.

Cony *verſus* Cony.

Linc.

Peregrine Cony avows (in a Replevin brought by Sir Thomas Cony his Brother) for twenty Marks per Annum, granted to him by the will of his Father for life, to commence after the end of eight years contained in the Will, and in the Will no mention is made of any eight years, and that was averred, and by the opinion of the Court it ought to commence preſently. Trin.

Replevin: Annuity for life to commence after 8. years mentioned in the Will, where there is no mention made thereof.

Trin. 17 Jacobi.

Smith verſus Sir John Boucher.

Mich. 16 Jac. Rot. 3339.

London 1.

HEdward Smith brought a Writ of Annuity againſt Sir John Boucher, and Thomas Jones de placito quod red. ei 120 l. and Count that the Defendants by their Deed (ſhewn in Court) reciting that whereas the King (by his Letters Patents) had granted to them, and to one William Turner certain Priviledges and Licenſes concerning the making of Allom within this Realm, and within the Realm of Ireland for twenty ſeven years, for the Councel given before by him to the Defendant (he being Counſellor at Law) concerning the drawing of the Letters Patents: And for his Councel to be given afterwards, granted to him the ſaid annual ſum of 40 l. for 26 years next, payable at Midſomer and Chriſtmaſs. The Defendant plead that the King granted the ſole making of Allom to them as in the Letters Patents, and confeſs the grant of the Annuity to the Plaintiff by Deed indented, one part whereof ſealed with the Seal of the Plaintiff they ſhew, &c. But further ſaid, that the ſaid Annuity was granted Percipend. extra clara lucra & proficua, which accrue to them by the making of Allom: And they aver, that no clear gains or profits have accrued to them, or any of them by making of Allom, ſince the making of the ſaid Indenture, whereupon the Plaintiff demur. Annuity. Hob. 248. A grant of an Annuity out of the profits of Allom.

1. And Judgment was given for the Plaintiff, for it is one good Grant of an Annuity to charge their perſons: and ſo of a Grant of an Annuity to be paid out of ſuch Coffers or Bags, vide 9 H. 6. Margery Parkers caſe, vide 22 H. 6. 12. Charge the perſon.

2. Alſo the limitation is to perceive of the clear gains, and plead it by the Counter-part of the Indenture, and that ought not to be, but they ſhould have demanded Oyer of the Deed, and then either demur, or plead that the ſame Deed was granted over, &c. Plea by Counter part, &c. not good.

3. It is not averred, that no other perſon received or made any clear gain, but only that the Defendant made no clear gain.) Averment.

Burglary.

MEmorand. At the Aſſiſes holden at Winchester in the laſt Circuit, before the Lord chief Baron Tanfield (it being the third Circuit which I went with him:) It was a queſtion, whether one which had a Shop in the dwelling houſe of another, and he which had the Shop work'd therein in the day, but never lodged there, and yet he had a houſe out of the Shop to the Street, if this Shop be broken in the night, and divers goods ſtollen out thereof: if it be Burglary. And the Lord chief Baron and I reſolved that it was no Burglary, becauſe that by the ſeverance thereof by leaſe to him which had it as a Shop, and his not inhabiting therein, it was not any Manſion houſe or dwelling houſe, & ergo no Burglary, but ordinary Felony. Burglary, not in a Shop diſtinct from manſion houſe.

Adams *verſus* Flemming.

Mich. 15 Jac.

Caſe. Hob. 283.

Words, Thou haſt forſworn thy ſelf before the Councll in the *Marches*, in a Suit.

AN action of the Caſe was brought for theſe words, Thou haſt forſworn thy ſelf before the Council in the Marches (innuendo in the Marches of Wales) in a Suit which I have there, and I will ſue thee for Perjury. And after iſſue of Not guilty pleaded, and Verdict for the Plaintiff: It was moved in Arreſt of Judgment by Chibborn, that the Common Law takes no notice of any ſuch Councels, and they are to meddle according to inſtructions, and if it be not warranted thereby, then no Oath whereupon any remedy: And therefore it was adjudged that if one ſay, another is forſworn or perjured in Canterbury Court, no action lies, for we cannot take any notice of any Court in Canterbury, which hath power to adminiſter an Oath. But Serjeant Harris ſaid, that this Councel of the Marches, is eſtabliſhed by 27 H. 8. cap. 32. and have power to examine Witneſſes and to adminiſter an Oath, and is alſo mentioned in the Statute 5 Eliz. that Perjury committed before the Councellors of the Marches ſhall be puniſhed by this Statute. And the Court was of Opinion, that the action well lies, for the Councel of Marches (without innuendo) is ſufficient, for there is no other Councel of Marches. And as the Court take notice of the Court of Requeſts (for if one ſays another is perjured there it is actionable) ſo of this Court which is eſtabliſhed by Statute, and concern the King, and thereof the Judges ought to take notice; Judgment for the Plaintiff. And by Lord Hobart, if one ſays, another is forſworn in the Common place, an action lies.

Mich. 17 Jac.

Bradſhaw *verſus* Walker.

Caſe. Hob. 249. Words, Filtching money.

AN action of the Caſe was brought for ſaying, Thou art a filtching Fellow, and didſt filtch four pounds from me; And after Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the words were not actionable: And ſo the Court reſolved, for the word filtching is dubious, and may be by Couſenage, by ſhifting, by deceit, and is not Felony but by Implication; and it is not good to enlarge actions for words. Plaintiff Nil capiat per breve.

Green *verſus* Harrington.

Caſe. Hob 284. Aſſumpſit lies not for Rent.

PEter Green brought an action upon the Caſe againſt Thomas Harrington, and counts, that whereas the Defendant ſuch a day was indebted to him in ten pounds for the rent of one houſe and land which he had demiſed to him for one year then paſt, the Defendant promiſed to pay it upon requeſt; and upon iſſue Non Aſſumpſit, it was found for the

the Plaintiff, and moved in Arreſt of Judgment by Chibborn, that no action lies upon this promiſe, becauſe it is Debt for the rent for Land; and the Aſſumpſit is of a leſs nature, as if one be indebted upon an Obligation, and that being forfeited, he promiſed to pay it, no action lies, for the Debt is due upon the Obligation: And the opinion of the Court accorded. This was ruled in Albanies caſe of Lincolns-Inne in Banco Regis.

1 Croke 343 acc. 415. Albanies caſe.

Trin. 17 Jac. Rot. 1849.
Caſtilion *verſus* Smith.

AN action of Covenant was brought by Sir Edward Caſtilion againſt Thomas Smith as Executor, and a breach aſſigned by act done by the Executors; and after Verdict it was moved if Judgment ſhould be De bonis propriis, by reaſon the breach was made by the Executors: And it was reſolved that it ſhould be De bonis teſtatoris. And where the Writ is in the Detinet only, there the Judgment ſhall be De bonis teſtatoris, vide the like Judgment, Hil. 33 Eliz. Rot. 1143. between Johnſon and Barker.

Covenant. Hob. 188, 283. acc. Dyer 324. pl. 34. Judgment againſt Executors for Covenant broken by them, ſhall be *De bonis teſtatoris*. Johnſon and Barker.

Pies Caſe.

PIe exhibited an Information upon the Statute of the 35 of Eliz. for converting of a houſe in London into many dwelling houſes; and upon Not guilty pleaded, the Defendant is found guilty. But becauſe the ſaid Statute is diſcontinued by the 43 Eliz. and there is no ſuch Statute, the Court (upon motion in Arreſt of Judgment) award, that the Defendant eat inde ſine die: And whether the Defendant in this caſe ſhall have coſts upon the Statute of 18 Eliz. cap. 5. was the queſtion.

Coſts againſt an Informer ſuing on a Statute expired.

The words of the Statute are, If any Informer willingly delay his Suit, or diſcontinue, or be non-ſuited, or ſhall have the matter or the trial paſs againſt him by Verdict or Judgment in Law, he ſhall pay coſts.

1. Object. It was objected, that this Statute doth not extend but only to penal Statutes which then were in Eſſe.

Anſw. To which it was anſwered by the Court, that this Statute was a perpetual direction to all Informers.

2. Object. It was objected, that if there be no Statute, then there is no Informer.

3. Object. In this caſe Verdict is found for the Informer, and he may be preſumed to be ignorant: And there is no reaſon that he ſhall pay coſts for default of his Councel.

4. Object. There is no Judgment againſt him, but that the Defendant eat inde ſine die; and that is no other than an exception in ſtay of Judgment: And a Preſident was cited by Henden 25 Eliz. Banco Regis; there upon an Information againſt Keldridge; and another upon the Statute of 35 H. 8. for not incloſing Woods, but ſuffering them to lie open after cutting by the ſpace of one Month: he alledged the cutting

Keldridges caſe.

ting the tenth of April, and the lying open until the ſecond of May, which was not a month: And upon Not guilty pleaded, it was found for the Plaintiff; and upon motion in arreſt of Judgment, it was awarded that the Defendant eat inde ſine die, and no coſts.

And the Lord Hobart ſaid, that this Statute was made for the eaſe of the Subject, and for avoiding and preventing of vexations, & therefore did enumerate all the caſes in which the Informer could not prevail, and had many words that the Statute of 23 of H.8. or any other Statute doth not give expreſſly coſts upon demurrer; and this is not within 23 H.8. if upon diſcontinuance; And now the matter paſs againſt the Informer, be it by Verdict or Judgment, all is one, for the makers of this Statute intended to curb all vexatious Informers: And if it ſhall be ſuffered that Informers may Inform upon Statutes not in force, and pay no coſts, that would open a Window to the great vexation of the Subjects. And for Preſidents not inſiſted upon, they are of little eſteem. And I concurred, and though Verdict be found for the Informer, yet there being no Statute there can be no Offence, and it is in Law as Not guilty; and this caſe is within the meaning and Letter of the Statute, for the Statute intends coſts where the cauſe paſs againſt the Informer, be it by default of matter or form.

Preſidents how valued.

Winch doubted of this ſpecial caſe, becauſe the matter is found for the Informer; but he agreed if it were upon Judgment, upon demurrer or ſpecial Verdict, coſts ſhould be given.

And Juſtice Warburton was of opinion, that there ſhould be no coſts in this caſe, for he is not capable to ſue where the Statute is diſcontinued: And ſo if the Venue be miſawarded, and he ſaid, that he had conference with the Lord chief Baron, who alſo held that there ſhould be no coſts in this caſe: and ſo the matter reſts.

Blackburnes Caſe.

Norf.

Debt. Hob. 285.

AN action of Debt was brought by I. S. againſt Blackburne upon a Leaſe for a year, and ſo from year to year; and upon Nil debet pleaded, the Jury gave a ſpecial Verdict to this effect.

A Deviſe to a Feme till her Daughter comes to ſuch an age, is a Term, and goes to her ſurviving Huſband.

Wells ſeiſed of Land in Fee, deviſed them to his Daughter and her Heirs, when ſhe come to the age of Eighteen years, and that his Wife ſhould take the Profits of the Land to her uſe, without any account to be made until the Daughter come to the age of Eighteen years: And made his Wife his Executor and died; and it was provided that the Wife ſhould pay the old Rent, and find the Daughter at School until ſhe could read and write Engliſh, the Feme enters and proves the Will, takes husband and dies, the husband aſſign this term to the Leſſor who brought this Action. And it was found that all the Conditions were performed, and that the Daughter was within the ſaid age of Eighteen, viz. Thirteen years.

And the ſole queſtion was, Whether it be a term for years in the Wife, and whether (when ſhe takes husband) he ſhall have it after the death of Wife; and it was ruled clearly that it is, and it being by Will it is a good Leaſe.

Another Queſtion was, if this truſt of Education be *Quaſi* a Limitation

tion perſonall, and with intent that the Leaſe ſhall not be to the Wife any longer then ſhe may educate her Daughter: And it was agreed that it was not, for any one may educate her, and find her at Schoole, and there it is without any default in the Wife, for it is the act of God; and therefore Judgment for the Plaintiff. Condition to Educate, &c. goes to the husband.

Trin. 17 Jac.

Whittingtons Caſe.

Judgment in Debt againſt Ferdinand Earl of Derby I. Whittington, and his Wife (the being Adminiſtratrix to her Husband who had the Judgment) brought a Sci. fac. upon the Judgment againſt 30. Tenants, they appear all beſides 3. plead, that at the time of the Judgment Ferdinand the Earl was ſeiſed in tail, &c. And the Plaintiff had Judgment againſt the three with a ceſſet Executio; and afterwards Whittington the Husband died, and this is ſurmiſed and entred upon Record, viz. the death of the Baron after the Darrein continuance; and whether the Writ ſhall abate or no, was the queſtion: And per totam Curiam the Writ ſhall abate, for the Wife there cannot recover as a Feme ſole; and thought this Writ be judiciall, yet it is in nature of an Originall, for ſhe might have had an action of debt upon the Judgment, and ought to have that action only after the year, untill the Statute of Weſtminſter 2. which give Scire facias, and to this Writ they may plead: But in Writs Judiciall, which are only Writs for the doing of execution, there the death of one ſhall not abate it; vide 19 Aſſ. 10. & 25 E. 3. and vide Reads caſe Cooke lib. 10. fol. 134. *Scire facias.* Hob. 287. *Sci. fac.* by the Baron and Feme the death of one of them ſhall abate it. V. 1 Cro. 167. 5 Rep. 9. b. 1 Rep. 96.

Ruggles Caſe.

IN Ruggles Caſe, upon the motion of Serjeant Atho, upon the Statute of 1 Jacobi cap. 15. concerning Bankrupts, a Commiſſion was ſued out by ſome of the Creditors, and they purſued it, and the Land was ſold, and it being oppoſed, they defended their ſeveral Suits, and prevailed by a tryall at Bar: And after other Creditors (which before would neither partake nor aid them) came and prayed to be joyned with them. And the Commiſſioners doubted upon the Statute, whether they might allow them to be joyned; and the words of the Statute are, That it ſhall be lawfully for any of the Creditors of the Bankrupt within four months after the Commiſſion ſued forth, and till diſtribution ſhall be made by the ſaid Commiſſioners, for the payment of the Bankrupts Debts, as in ſuch caſe hath been uſed, to partake and joyn with other Creditors that ſhall ſue out the ſaid Commiſſion, the ſaid Creditors ſo joyning, to contribute to the charges of the ſaid Commiſſion, and if the Creditors came not in within four months, then the Commiſſioners to have power to diſtribute, Hob 287. How the diſtribution of the Eſtate of a Bankrupt ſhall be. 1 Jac. c. 15.

It was reſolved, that the Commiſſioners may ſell and prepare for diſtribution preſently upon the execution of the Commiſſion; but untill the four months are paſſed, they may not proceed to diſtribution; When to ſell and when to diſtribute.

for the Creditors which inhabite in the remote part of the Realm, peradventure cannot have notice: and it may be carried ſo ſecretly, that if they might diſtribute preſently, that they which ſued out the Commiſſion ſhould be only ſatisfied, when indeed there was no default in the others.

Also it was reſolved, that the offer of Creditors to be joyned, and before they be partakers, is not an effectuall offer, with offering to be contributory to the charges: But to offer any particular ſumm, is not neceſſary, because they know not what ſumm is diſburſed, and that is to be aſſeſſed by the Commiſſioners. And the words (for the charge of the Commiſſion) is to be extended to all charges ariſing in ſuing forth the Commiſſion, and in execution and defence thereof.

Contribution what?

For what.

Also it was reſolved, that at any time before the diſtribution made, they may come and pray to be joyned: But after four months paſſed, and any diſtribution made (though it be but of part) then they come too late: For by this means the diſtribution which is made, and whereby ſome of the Creditors ſhall receive more, ſhall be utterly avoided, and another propoſition made, which was not the intent of the Statute.

No Joinder after diſtribution.

Paſch. 18 Jac.

Maſon *verſus* Thompſon.

AN action upon the caſe was brought for theſe words, I charge thee with Felony for taking forth from John Scot's Pocket, and I will prove it.

Case. Hob. 305.

Words.

Henden moved in Arreſt of Judgment that theſe words were not actionable.

First, because that it is not any direct affirmative that he is a Felon; and for that he vouched a caſe (as he ſaid) judged in the Kings Bench, Maſters, bear Witneſſe that he is a Thief.

The ſecond reaſon, was, because that the matter ſubſequent doth not containe matter which muſt of neceſſity be Felony, but ſtands indifferent: For if it be not privily and ſecretly, it is not Felony; and it may be by way of ſport, or treſpaſſe: For as one ſaid, That he is a Thief, and ſtole his Timber, it is not actionable, for it might be Timber cut, or Timber growing: ſo to ſay, That he ſtole his Corn or his Apples, or his Hops: For in Mitiorem partem verba ſunt accipienda. And it ſeemed to the Lord Hobart that the firſt words, viz. (I charge thee with Felony) are actionable, for the Conſtable (if he be there preſent) ought to apprehend him thereupon, and it is a plain Affirmative I arreſt thee of high Treaſon; Juſtice Winch prima facie held, that the words were actionable, and not qualified by the ſubſequent words, as it ſhould be if he had ſaid, For thou haſt ſtoln my Apple Trees ſtanding in my Orchard, that could not be Felony, but it is not ſo there, for it may be Felony, and ex cauſa dicendi, it ſhall be taken Felony, in theſe words, for taking money, &c. Warburton and Hutton was of opinion that the Action lay not.

Vide Popham.

This Caſe was moved in Mich. 18 Jac. And then the opinion of the Court præter Warburton qui hæſitavit) was that the Action did not lye. Ideo memorand. quod querens nil capiat per breve.

Trin

Trin. 18 Jac.

Hall *versus* Woollen.

JOhn Hall an Attorney of this Court brought an action upon the case against Woollen, and declared, that whereas the Defendant was poſſeſſed of an Houſe and Land in Melton Mowbray in the County of Leiceſter, for one term of the Leaſe of Sir John Woodward: And whereas one Webb was in communication of buying the ſaid Leaſe of Wollen, and Wollen could not ſell it without the aſſent of Sir John W. the Defendant in conſideration that the Plaintiff would procure licenſe of the ſaid Sir John, he promiſed to pay to him ſo much as he ſhould diſburſe, and deſerve therefore: And averred that he did procure a Licenſe, and delivered it to the Defendant, and diſburſed ſuch a ſumm, and deſerved for his labour ſuch a ſumm; and the Defendant upon the Count did demur. And the queſtion was, whether that were a good conſideration or no, for it did not appear that there was any condition to reſtrain him from making an Aſſignment; and if I promiſe, that (whereas I am obliged to A.) if you will procure B. (which is a ſtranger) to make a Releaſe thereof to me, I will pay you forty pounds, though it be done at my inſtance, no action lies, for it is apparent that B. could not releaſe the Obligation: But it was adjudged that is a good conſideration, for it appears that there was privity between them, and it may be that he had promiſed that he would not aſſign it without his licence: And in good diſcretion it was convenient to have it, alſo it was at his inſtance, and for his ſatisfaction: And it hath been adjudged, if one promiſe forty pounds to another, if he can procure the aſſent of the Mother of a woman, though he may do it without ſuch conſent, yet it is a good conſideration.

Caſe. Conſideration of an Aſſumpſit.

To procure a fact done which appears not to be neceſſary.

Mich. 18 Jac.

Clerk *verſus* Wood.

CLerk brought an action upon the caſe againſt one Wood, alias Warren, and count that he was ſeiſed of an houſe and twenty acres of land, &c. in Thurſfield; and that he and all thoſe whoſe Eſtate he hath, have had a Common in ſeven acres in Thurſfield: And that he and all thoſe, &c. have had one way leading through the ſaid ſeven acres, and from thence into one Common way leading to Buntingford; and from Buntingford to Blakeley: And that the Defendant had plowed and turned up the ſeven acres, and eſtopped the way. The Defendant pleaded not guilty, and the Venire facias awarded de Turſfield. And it was moved in Arreſt of Judgment by Serjeant Jones, that it ought to be from all the Towns through which he claim his way, for he ought to prove it in evidence, viz. that he had a way, or otherwiſe he is not endamnified. But it was reſolved that the triall was good, for Not guilty is properly a deniall of treſpaſſe and diſturbance; and though he

Caſe. Hob. 305.

Vin. fac. upon preſcription for a way in divers Towns

he ought to prove title to the way, yet it is ſufficient if he prove title to the way by and through the ſeven acres upon evidence. And yet if the Preſcription had been traverſed, then he ought to prove all the way and the tryall ſhall be from every Town through which the way is pleaded to be extended. quod vide 10 E. 4. fol. 10. where it was in two Counties, and the Venire facias ſhall be from both, and the tryall ſhall not be by Niſi prius: vide the caſe between Reyner and Waterhouſe ſupra 27.

Mich. 16 Jac. Rot. 2344.

Lamb *verſus* Thompſon.

Debt. Hob. 304. A Condition not to be aſſiſting to another, hinders him not to bring a Writ of Error joyntly with him.

EDmund Lamb brought an action of Debt againſt Richard Thompſon, upon an Obligation of forty pounds, the Condition whereof was, If the Defendant ſhall not be aſſiſting, or any waies aiding unto Thomas Elme, or any other perſon for the ſaid Thomas Elme, in any Actions, Suits, Vexations, &c. to be commenced and proſecuted againſt the ſaid Plaintiff, &c. That then, &c. the Defendant pleaded Negative: The Plaintiff reply, that he ſuch a day brought Treſpaſſe againſt the ſaid Thomas Elme, and the now Defendant, and had Judgment; and that the Defendant joyned with him in a Writ of Error, in hinderance of the plaintiff to have execution againſt the ſaid Thomas Elme, and ſo was aiding and aſſiſting unto the ſaid Thomas Elme: Whereupon the Defendant demurred, and it was adjudged by the Court, that this proſecution of a Writ of Error to diſcharge himſelf of an erroneous Judgment, is no breach of the Condition, no more then if the Plaintiff had releaſed, and he had brought an Audita Querela: And it ſhall be intended in this caſe of a Suit to be ſolely commenced by the ſaid Thomas Elme; and if he will reſtrain him, that he joyn not in a Writ of Error, it ought to be preciſely contained in the Condition, and ſhall not be taken by a large Expoſition, to the forfeiture of an Obligation, by a generall and ambiguous ſentence. It

Joinder in Error.

was urged that the Defendants had power to have ſeverall Writs of Error, 11 H. 6. 9. But the Court reſolved, that being the Coſts were joynt, they ought to joyn, vide Cooke lib. 6. fol. 25. but the releaſe of one will not bar the other, vide 34 H. 6. 42. & 35 H. 6. 10. that this Suit is in diſcharge of the Defendant, and not to charge the Plaintiff; and therefore the Condition is not broken, vide Dyer 253. A Condition to ſuffer a Leſſe quietly to enjoy, the word (ſuffer) guide all the ſentence in favour of the Obligor; and Judgment cannot be reverſed in part, and

Judgment not to be apportioned

ſtand for the other part, or be reverſed againſt one, and ſtand in force againſt the other, except in ſpeciall caſes. As where Infant Tenant for life, and he in remainder of full age levy a Fine, that ſhall be reverſed as to the Infant, and ſtand for the remainder, for it is no other then as a Conveyance;

Mich.

Mich. 18 Jac.

Powell *verſus* Ward.

AN Action of the Caſe was brought for theſe words, I have matter enough againſt thee; for John Halden hath found forgery againſt thee, and can prove it: And after Verdict it was reſolved by the Court, that the words are too general, and will not maintain an Action, no more then if one ſaid, that another had forged a Warrant, for it might be a Warrant for a Buck; and this is not right Affirmative.

Caſe. Hob. 327. 305. Words too general. Forge a Warrant.

Sherley *verſus* Underhill.

A Quare impedit brought by George Sherley Baronet, againſt Underhill and Burſey, for preſenting to the Vicaridge of the Church of Nether Elington, and count of a Nomination as appendant to the Manno^r of Elington, and Iſſue thereupon, for they pretend it to be appendent to the Rectory of Elington: And it was found for the Plaintiff at Warwick Aſſiſes, and Judgment there for him, and a Writ to the Biſhop, and thereupon a Writ of Error was brought in the Kings Beneh, and it was to remove a Record which was between George Sherley Knight and Baronet, and the truth was, that Sir George is not, neither was named Knight by all the Record: And therefore the opinion of the Court was, that the word Knight is part of the name, and ſo no Record was removed: And it is ſo material that the addition where there is none, or the omiſſion where it is, Knight, makes it no ſuch Record, and they perceiving it, diſcontinued their Writ.

Quare Impedit. Error in *Quare impedit.* Hob. 327. Knight, parcel of the name.

Memorand. That though Judgment was given at the Aſſiſes, the Writ of Error was directed to the Lord Hobart, and the Record is demurrant in the Court of Common Beneh. And now it was moved, that the Judgment might be amended, for it was Quod recuperet preſentationem ſuam ad Eccleſiam prædictam. And the value found of the Church aforeſaid: And it ſhould be Quod recuperet præſentationem ad vicariam Eccleſiæ, & valorem vicariæ Eccleſiæ: And it was urged that it was not the miſpriſion of the Clerk, but of the Court; and Judgment erroneous in point of Law is not amendable, for if it be Quod capiatur, where it ſhould be Quod ſit in miſericordia, it is not amendable. But it was reſolved and ſo awarded by the Court, that it ſhould be amended: And the reaſon is, becauſe the Verdict is general, and they found for the Plaintiff, and the Judgment ought to agree with the Verdict: But it is ſolely miſpriſe by the default of the Clerk, for the Record precedent is in every part, and in the Iſſue and Verdict, Vicariam Eccleſiæ; And by the Statute 8 H. 6. cap. 15. that is amendable, for the miſpriſion of the Clerk in the Record ſhall be amended, though it be in the Judgment, vide Dyer 258. Alſo Mich. 33 & 34 Eliz. Rot. 230. between Wilde and John Woolſe, Ideo conſiderat. eſt quod prædictus Thomas Wilde recuperet verſus prædictum Thomas Woolſe, where it ſhould be John; and Error was brought, and it was amended.

Judgment amended. *Wilde* and *Woolſe*, *Mich.* 33 & 34 *Eliz.* 230.

Stepney and *Woolfe.*

42 Eliz. Rot. 693. An action of the case by Stepney against John Morgan Woolfe. Id consid. quod recuperet versus prædictum Morgan Woolfe, and there was no such Defendant, but John Morgan Woolfe, and it was amended upon Error brought in the Eschequer Chamber.

And vide Coke lib. 8 fol. 164. Blackamores case, more cases upon this learning; where the misprision of the Clerk in the entry of the Judgment of a thing which is apparent, and not of necessity shall be amended, as in Misprision of the sum of Arrerages before and pending the Writ of Annuity shall be amended, vide 9. Eliz. Dyer 258.

Mich. 18 Jac.

Sir Thomas Wentworths Case.

Replevin.

Demand of Rent with a *Nomine pœnæ* after Issue joyned upon other matter.

V. Deut. 23.

SIr Thomas Wentworth brought Replevin, the Defendant avowed for a Rent granted, and a Nomine pœnæ, and shews not any Demand of the Nomine pœnæ; But the Issue was tried, and found upon other matter, viz. Non concessit: And now it was moved in Arrest of Judgment, that he avowed for a Nomine pœnæ, and did not alledge any demand thereof; yet Judgment was given for the Avowant: For it is matter confessed, and the Action is a request, viz. the Avowry, for he is there the Actor: And it is but a Circumstance collateral to the right: And in Actions upon the Case founded upon a promise, after request a Licet sæpius requisit. shall be a sufficient Allegation of a request.

Davies Case.

Statute-Merchant without day of payment.

This case was adj. otherwise by *Jones*, *Winch* and *Hobart*, *Hutton* contr. In *Masculine* and *Hunford's* Case. Tr. 22 Jac. in C. B. Vid. Bridgeman's Rep. 21.

ONe Davies acknowledged a Statute-Merchant at Gloucester in three hundred pounds, and the Statute did not limit any day of payment, and yet an Extent was sued; And upon motion by Serjeant Harris, a Supersedeas was awarded; for that is no Statute, for they had not pursued the Authority given by the Statute: For the Statute of Acton Burnell, 11 E. 1. says, if the Debt be not paid at the day: And though Debt upon an Obligation is payable presently, if the day be not expressed, yet there the Statute appoint a day certain.

Pasch. 15 Jac. Rot. 1714.

Cartwright *versus* Underhill.

Trover and Conversion.

Bankrupt.

AN action of Trover and Conversion was brought by Abraham Cartwright against Clement Underhill: And upon not guilty pleaded, there was found a special Verdict to this effect.

Francis Bayle being a Merchant, had made a fraudulent Deed to the Defendant of the Goods contained in the Count, but afterwards he went abroad to Church, to the Exchange, and did Trade and Commerce:

merce: And yet afterwards it is contained in the Indenture of Sale by the Commiſſioners to the Plaintiff, that he had made this fraudulent Deed, and that afterwards he had traded and ſerved the Exchange until a day after, at which day he wholly abſented himſelf. And upon this ſpecial Verdict the Defendant had Judgment.

For every Deed to defraud other Creditors (but thoſe to whom ſuch Deed is made) is not ſufficient to make one to be a Bankrupt: But if he make any Deed after he begins to be a Bankrupt, it ſhall not bind: But upon the Statute of 1 Jac. which makes him a Bankrupt, which make fraudulent Deeds, it ought not to be as this caſe was, viz. ſo long before he became a Bankrupt: And there were many more imperfections in the ſpecial Verdict. Fraudulent Deed of goods before he is Bankrupt.

Hill. 18. Jac.

The Earl of Clanrickards Caſe.

THe Earl of Clanrickard, and Frances his Wife, brought a Writ of Right againſt the Earl of Leiceſter; And upon the Summons being returned (but no return of proclamation made at the Church of the Pariſh where the Land lies upon the Lords day Poſt prædicationem ſive Divinum ſervitium) there was an Eſſom caſt, and that was adjourned in the Eſſoin Roll: And the Demandants perceiving the return to be inſufficient, they ſue an alias Summons, which having great returns (as all the Writs iſſuing out of this Court in a Writ of Right, or other real actions ought to have) was returnable, Oct. Hil. And the Tenant caſt an Eſſoin upon the alias Summons: And it was moved at the day of Eſſoin, and now alſo at the firſt day of the Term by Serjeant Harris, that an Eſſoin did not lye, for he had an Eſſoin before: And by the Statute De Eſſonii calumniand. 12 E. 2. Non faciant quia alias ſe eſſoniavit: And the Statute 31 Eliz. cap. 3. which gives the proclamations, hath provided that no Grand Cape ſhall be awarded upon this default, but only an alias Summons, ſo that the Writ is good and ſtands, and therefore he ſhall not be otherwiſe eſſoined: But it ſeemed to the Court to be otherwiſe here; for the firſt Eſſoin is as Nul, and therefore vide Dyer 252. that when the Sheriff return tarde in a Formedon, and the Tenant is eſſoined, and that is adjourned, it is of no effect, but he ſhall be eſſoined upon the other Writ of alias, &c. vide 24 E. 3. Br. Eſſoin 24. accord. alſo vide 21 H. 6. That upon the reſummons after the death of the King, the Tenant ſhall be Eſſoined, and yet the firſt Writ and all is revived: And in this caſe though the party may appear to the firſt Writ, nec. ne beſoigne de ject' un Eſſoign, for the nature of that is to ſave a default, ſo that no Grand Cape ſhall be awarded, and there no Grand Cape ought to be awarded, and therefore the Eſſoin before not available. Writ of Right. Eſſoin upon the return of an *alias* Summons. Vide Hob. 1. 46. 329. 12 E. 2. 31 Eliz. c. 3.

Hill.

Hil. 18 Jac. Rotulo 739.

Bridgeland *verſus* Poſt.

Dower. Counter-plea to the view.

BRidgeland againſt Poſt and his Wife in a Writ of Dower, the Tenants demand the View, and the Demandant counter-pleads the View, Quod le tenant n'ad entry niſi per le Baron; And thereupon the Tenant demur: And it was adjudged a good Counter-plea, and the Tenant ouſted of his View, Accord. 9 E. 4. fol. 6. vide 2 H. 4. 24.

Paſc. 19 Jac.

King *verſus* Bowen.

Caſe.

Words.

Thou art forſworn is actionable. Vide 1 Bulſtrods Rep. fo. 40.

Vid. Deut. 34.

KIng brought an Action of the Caſe againſt Bowen a Miniſter, for ſaying, Thou art a falſe forſworn Knave, and didſt take a falſe Oath againſt me at a Commiſſion at Eccleſall (innuendo a Commiſſion ſued out of the high Commiſſion,) the Defendant juſtifie, and after iſſue tried and found for the Plaintiff, it was moved in Arreſt of Judgment, that theſe words were not actionable, for it doth not appear in the Count, what Commiſſion, nor out of what Court, nor what matter he did depoſe, but generally, that he had taken a falſe Oath at a Commiſſion. The former words (forſworn Knave) will not maintain an Action, otherwiſe of Perjured Knave, for that ſhall be intended in a legal ſenſe; and no Innuendo will ſupply matter which give not cauſe of Action, nor the Juſtification: But the words ought to contain ſcandal in themſelves, without any ſupplement. An Action lies for ſaying, one had forſworn himſelf in a Court Baron, and to ſay, he had forſworn himſelf in the Common Place; but to ſay, that one hath forſworn himſelf at the Bar (innuendo the Bar of the Common Place) will not maintain an Action, Querens nil capiat per breve.

Paſch. 19. Jac.

Tippin *verſus* King.

Waſt.

Inquiry of Damages by default.

Vid. Poph. 24.

Ewer and *Moyle.*

SIr George Tippin Plaintiff, in an Action of Waſt againſt King, and alledge Waſt in ſeveral Cloſes Sparſim: And Judgment by nihil dicit, and an Inquiry awarded, the Jury found but eight pence Damages: And upon motion for a new Writ, it was reſolved, that the Jury ought not now to enquire of the Waſt: And therefore the difference is, when the Plaintiff upon the diſtreſs recover upon the Statute; there the Statute gives power to enquire of the Waſt: But in this caſe the Waſt is confeſſed per nient dedire, Dyer 204. a. accord. And it was ſo adjudged between Ewer and Moyle upon demurrer in Waſt, there the Waſt is confeſſed, and the Writ ſhall be only to enquire

quire of the Damages; ſo if the Plaintiff will releaſe his Damages, he ſhall have a Writ upon Judgment of the place waſted. Damages releaſed.

Mich. 18 Jac. Rot. 2805.
Pitt *verſus* Chick.

MAtthew Pitt brought Replevin againſt Chick; The Defendant avow, for that the place contains five acres, which lie between the Lands of Sir George Speck: And that the ſaid Sir George Speck and all his Anceſtors, de temps d'ont, &c. have uſed to have Herbage and Paſture of the ſaid five acres, viz. if they were ſowen, then after the reaping until re-ſowing; and if they were not ſowen, then for the whole year, and convey Title to the ſaid Herbage by Leaſe in writing to him, and avow Damage feaſant. Replevin. Preſcription to have Herbage.

And it was urged, that he which had all the profit for a time, and the ſole profit, had the Freehold; and that is not a thing which lie in Preſcription, ſemble al Common, or to paſture for a certain number of years: And it was ſaid, that a Grant de veſtura terræ, or de herbag. terræ for one and twenty years, is a good Leaſe. But it was adjudged that it is a good Avowry, and he had only profit a Prender, and that he might have an Aſſiſe, or juſtifie for Damage feaſant: And he which hath the fore-crop is he which hath the Free-hold, 15 E. 2. Fitz. Preſcription 51. And the very caſe is, temps E. 1. Fitz. Preſcription 55. and this ſole feeding might have Commencement by Grant, and therefore a good Preſcription. Judgment for the Avowant. Herbage. Veſture of Land.

Trin. 19 Jac.
Wilſon *verſus* Stubbs.

WIlſon brought Replevin againſt Ralph Stubbs; The Defendant makes Cognizance as Bayliff to the Earl of Northumberland, for Amercements within a Leet at Toxcliffe. And upon Iſſue joyned, and trial at the Common Pleas by default, it was alledged, that Ralph Stubbs was dead; and the Plaintiff would proceed, and had Judgment, Damages, and Coſts 16 pounds, and a Capias awarded to the Sheriff of York, and Ralph Stubbs the Son, as is ſuppoſed, is taken, and had an Idemptitate nominis, which Writ being directed to the Juſtices, they award a Superſedeas: And now upon divers motions, the 16 pounds was brought in Court, and they proceed upon the Idemptitate nominis. The queſtion was, if the Superſedeas lie thereupon, being that it is only a ſurmiſe and matter en fait, and lies properly and more frequently, for preventing an Arreſt upon Outlawry, and after that the party is taken upon the Outlawry, vide 5 E. 4. 23. & vide lib. Intrat. and it is matter not frequent in uſe, and is in nature of an Audita Querela, and the party ſhall find ſurety to pay the Debt, if it be found that he be not another perſon: And the Court inclined ſtrongly that it is no Superſedeas, but it is much in the diſcretion of the Court, vide lib. Intrat. 5 E. 4. 36. bone Caſe, and fol. 51, & 53. Replevin. Hob. 330. *Idemptitate nominis* no Superſedeas to Execution. Dyer 5. b.

Mich. 19 Jacobi.

Allen *verſus* Swift.

Caſe. Words, Bankrupt of buyer of Lead.

ALlen brought an action of the Caſe againſt Swift, and declared, That whereas he bargained and ſold, that is to ſay, Merchandized for Lead in the County of Derby, and thereby hath acquired money towards his livelyhood: The Defendant ſaid of him, He is a Bankrupt, and is not able to pay his debts, but will run the Country; It was found for the Plaintiff, and moved in Arreſt of Judgment by Serjeant Harvey, that the Action lay not, becauſe that the Plaintiff ſhewed not, that he uſed it not as his Trade, nor that he gained his living by buying and ſelling; Alſo he is entituled Gentleman. But the Court held that the action would well lie, and it had been adjudged 14 Eliz. That a Tanner ſhall have an action for ſuch words.

1 Croke 31.

Mayes *verſus* Sidley.

Caſe. Conſideration of forbearance generally.

MAyes brought an action of the Caſe againſt Sir Iſaac Sidley, and count, that whereas one was indebted unto the Plaintiff in a hundred pounds by obligation, the Defendant in conſideration that the Plaintiff at his requeſt would forbear to ſue the ſaid party, and if he did not pay it, the Defendant would; And upon Non aſſumpſit pleaded, and Verdict for the Plaintiff, Hitcham moved, that is no good conſideration, for it is uncertain, for if he forbear one hour, one day, this is a forbearance; And he reſembled it to Palmers caſe, forbear him a little while, and if he do not pay it, I will: This was adjudged for the Plaintiff in Banco Regis, but afterward by a Writ of Error it was reverſed. And he cited a Preſident (which was ſhewn) of the 36 of Eliz. where the caſe was the ſame in effect with this: And Judgment reverſed, but it might be for other Errors.

And the Court inclined that this action lie, for when it is alledged that he did forbear, it ſhall be intended of ſuch a forbearance by which the party had eaſe and benefit, and ſhall be a competent and convenient time; and that ſhall be convenient time, as in other caſes: As Tenant pur auter vie, ſhall have convenient time to remove his goods after the death of Ceſtui que vie; And it ſhall be convenient time to purchaſe a Writ by Journeys Accounts: And it was ſaid, that there were many Preſidents of this caſe, and of the like actions, for if he doth not forbear convenient time, then it is no conſideration, and it being left indefinite, the Law will judge of the convenient time, but it was adjourned, and after the firſt day of Hil. 21 Jac. This caſe was moved by Hitcham, and he ſaid, that the Writ and Count vary, for the Writ is, Per magnum tempus diſtulit: And the Count ſaith, that he did forbear for the ſpace of a year and more: Alſo no time is put in the Writ, but is in the Count, and that he did forbear by a year and more after that; ſo that it doth not appear that he did forbear till the Writ purchaſed, for that appear to be half a year after the year paſſed, and he ought to forbear it totally. Richardſon anſwered him, that the

breve

breve, Writ did not comprehend the time and circumſtance, but the matter and ſubſtance, and not at large, for then it ſhould not be breve; As in a caſe ſur Trover, no day in the Writ, but in the Count, and forbearance of a year and more being alledged, and iſſue taken and found for the Plaintiff, it ſhall not be intended that he had ſued, and not forbeared till the commencement of that Suit: And it is like to a grant of a Rent (pleaded without Deed) and iſſue joyned upon Non conceſſit, and it is found Conceſſit, and good, for it ſhall be intended effectual, &c. Vid. apres 108. 54. 1 Croke 482.

And the Court ſhewed their Judgment, and concurred that Judgment ſhould be given for the Plaintiff: And this difference was taken when the promiſe appear to be ſuch, that it ſhall not be any benefit to the party in whoſe behalf it was requeſted, as forbearance for an hour, or a little time, there it is not good, but where it is general and not limited to any time, that ſhall be a total forbearance, or at leaſt a forbearance for a convenient time, and that ought to be alledged for ſuch a time, which the Court ſhall adjudge a convenient time. Hob. 219. 216. apres 108. 1 Bulſtr. 41. Poph. 183.

Lord Hobart agreed, but he ſaid, that it is not a total forbearance, for then it ſhould be that he ſhould not ſue him at all, but that he will forbear, is good by the ſubſequent forbearance; and there is no variation betwen the Count and the Writ, but the Count illuſtrateth, and amplifies the Writ. Judgment pro querente.

Paſch. 20 Jac.

Suggs *verſus* Sparrow.

IN a Sicre facias againſt the Bail, he plead that after the Judgment and before any Writ of Capias was ſued out againſt the Principal, he died: And upon Demurrer the Court adjudged it a good plea; and in this caſe a Judgment was cited, Hil. 40 Eliz. Tadcaſter brought debt againſt Hallowell, Hobs was Bail, and the Plaintiff recovered: The Defendant brought a Writ of Error in the Exchequer Chamber upon the new Statute, and after divers terms Hal. died, and after the Plaintiff was non-ſuited, without mention made of his death. Tadcaſter brought two Scire facias againſt Hobs, and upon the 2 Nihils had Judgment: Hobs brought an Audita querela, alledging the death of Hallowel before Scire facias, and before Capias; and it was adjudged that the Audita Querela well lay, and Hil. 4 Jac. Rot. 975. between Timberley and Calverly, Scire facias brought againſt the Bail, and he pleaded that the Principal died before Capias returned againſt him; And Judgment upon argument given againſt the Plaintiff: The like Judgment betwen Juſtice Williams, and the Sureties of one Vaughan.

Scire facias.

Bail is diſcharged where the Principal died before *Capias* awarded.

Tadcaſter againſt *Hallowell.*

Timberley and *Calverly.*

Hill.

Hil. 19 Jac Rot. 312, or 3125.

Walrond *verſus* Hill.

London.

Debt.

WAlrond brought an action of Debt upon an Obligation of three hundred pounds againſt William Hill, with Condition, that if Thomas Harris and Elizabeth his Wife, before the end of Eaſter Term next, ſhall levy a Fine before the Juſtices of the Common Pleas, by due courſe of Law, to the uſe of the Plaintiff; that then, &c. the Defendant pleaded, that before the end of the ſaid Eaſter Term, the Plaintiff did not purchaſe any Writ of Covenant, pro fine levand. whereupon a Fine might be levied according to the courſe of Law. The Plaintiff replied, that the fifteenth of April, the ſaid Thomas for money enfeoffed another of parcel of the Land that was to be conveyed by the Fine: And that the ſaid Thomas and Elizabeth his Wife have not any Eſtate or Intereſt in the ſaid parcel ſo conveyed, whereof they may levy a Fine: And upon this Replication the Defendant demurred.

One bound to levy a Fine before ſuch a day who ſhall do he firſt act.

And upon argument at Bar by Serjeant Harvey for the Plaintiff, and Serjeant Henden for the Defendant; the firſt queſtion was, If the Bar be good, Intant que le Defendant eſt oblige, That Thomas Harris and Elizabeth his Wife ſhall levy a Fine, he ought to procure that to be done at his peril, ſemble al 4 H. 7. & 3 H. 6. Condition that John S. a ſtranger ſhall take Alice D. to his Wife, before Mich. if I.S. refuſe, the Obligation is forfeited: And therefore it was urged that he ought to procure a Writ of Covenant at his peril. But the Lord Hobart held that the Plaintiff ought to procure the Writ of Covenant, to have made himſelf capable of the Fine: And he put this caſe, if I. S. be obliged that I. D. ſhall enfeoff I. N. the Obligee, ſuch a day I.N. ought to be upon the Land, or ought to make a Letter of Attorney to receive the Livery, or otherwiſe the Obligation is not forfeited: And when a Covenant is to levy a Fine, he which is to do the firſt act, &c. vide Palmers caſe, Coke lib. 5. fol. 127. & 4 E. 3. 39. 18 E. 3. 27. 11 *H.* 4. 18. 21 E. 4. 2.

1 Bulſtr. Rep. fo. 90. & *Auſtins* and *Culpeppers* caſe, B. R. in 16 Car. 2.

Averment of ſuing Writ of Covenant not now neceſſary V. 2 Cro. 251.

The ſecond queſtion was, whether this Obligation be forfeited, being that the ſaid Thomas Harris had made a Bargain and Sale of part of the Land to another before, ſo that he was diſabled at the time to levy a Fine: And we all agreed, that the Condition was impoſſible, and is all one as if he had diſabled himſelf afterwards; as in Maynes caſe, Coke lib. 5. 21. where the Covenant was to make a new Leaſe upon ſurrender of the former Leaſe, there if he which ought to make the new Leaſe, diſables himſelf to make a new Leaſe, and to accept of the Surrender, by granting the Reverſion for years, he ought not to do the firſt act, viz. Surrender, but the Covenant is broken: And in this caſe it is all one, as if one (who had granted the Reverſion for years or for life) Covenant that he upon Surrender will make a new Leaſe, he had broken this Covenant, being diſabled at the time: And it was ſaid and agreed by the Court, that the Fine to be levied ought to be an effectual Fine, which might operate to convey the Land according to the Covenant.

Burnell and *Brook*.

One caſe was vouched in this caſe to be between Burnell and Brook, where the Condition was, that he ſhould acknowledge a Judgment,

and

and a good Bar, that the Plaintiff had not purchaſed an Original Writ, for he ought to make himſelf capable of Judgment acknowledged to him, vide 34 E. 1. Fitz. Debt 164. A Condition that if he preſent the Obligee to a Benefice, that then, &c. Though the Obligee takes Wife, by which he is diſabled to take it, yet he ought to preſent and offer him to the Ordinary to refuſe him.

Vide 28 E. 4. 6 where parcel of the Land was recovered, yet Debt lies for the entire Damages recovered in a Court of ancient Demeaſn, which caſe was then vouched, but it is not much to the purpoſe: And afterwards we all agreed that the Plaintiff ſhould have Judgment.

Hord *verſus* Cordery.

A Preſident was ſhewn which was thus.

IN the County of Wilts, Richard Hord Clerk, Vicar of Chute, brought an Action upon the Caſe againſt William Cordery, and Bridget his Wife, and Dorothy Cox; for one malicious confederacy of charging the Plaintiff with the felonious Rape of the ſaid Dorothy Cox, and procured him to be examined before Sir Anthony Hungerford a Juſtice of Peace, and thereupon was bound in a Recognizance to appear at the next general Seſſions of the Peace at Deviſes, and from thence was bound over to the Aſſiſes: And there the Defendants An. 15 Jac. before Sir Thomas Flemming and Tanfield Juſtices of Aſſiſe preferred one Bill of Indictment of their malice aforeſaid, and by the procurement of the ſaid William and B. the ſaid Dorothy ſhewed to the grand Inqueſt, whether it were true or falſe. Caſe. Conſpiracy for procuring to be Indicted for a Rape. V. ſimile, 1 Croke 15.

And the Jury perceiving the malice and the falſity, did not find it to be true, and gave their Verdict by Ignoramus. Upon not guilty pleaded by William and Bridget, and non informatus by Dorothy, the Jury found for the Plaintiff, and after a Writ of Error, An. 15 Jac. and 20 marks coſts for the delay, Ego vidi recordum, & eſt bien & pleinement aver, que il ne raviſh le feme, & eſt ent. Hil. 10 Jac. Rot. 921. 1.

Trin. 20 Jac.

Hawkins *verſus* Cutts.

HAwkins brought an Action upon the Caſe againſt Cutts, and declared that he was of good Fame, &c. and for the ſpace of eight years laſt paſt, had uſed the Art and Myſtery of a Baker Pandopatorite, and had gained his living by buying and ſelling; the Defendant ſaid of him, He is a Bankrupt Knave: And upon not guilty, it was found for the Plaintiff: And in Arreſt of Judgment it was moved, that it is not ſhewn that he was a common Baker, neither had uſed the Trade, but uſed the Art and Myſtery of a Baker: And there is (as Lord Hobart ſaid) the ſame ſkill and art uſed by Bakers of Bread in private mens houſes, as by common Bakers; And every woman which bake in private (if ſhe be a good Houſwife) uſe the Art and Myſtery of a Baker. Caſe. Words. Bankrupt of a Baker. Not ſaying, a Common Baker.

And if a man had ſaid generally, that he had gained his living by buying and ſelling, and not ſhewn what Trade he had uſed, it is not good: Therefore the Trade ought to be alledged, and ſo ſufficiently, that the Court may judge him ſuch a perſon, as is within the Statute of Bankrupts. Alſo Winch ſaid, that it is not alledged, that he gained his living by buying and ſelling any thing which concern his Trade: And I was of the ſame opinion, and relied upon the caſe of 11 H.4.45. An action upon the caſe againſt an Inn-keeper, and ſhewed that he was lodged there, and his Horſe was ſtoln: And the Defendant pleaded a plea, that he delivered to him the Key of the Stable, &c. And by the Court the Writ ſhall abate, becauſe he did not ſhew that he was a common Hoſtler: And therefore Judgment arreſted.

1 Cro. 31. Popham 184. 1 Cro. 440. 1 Bulſtr. 40.

And the Court agreed that if the Count were good, the words would maintain an action; for a Baker is a Trade mentioned in the Statute 5 Eliz. but it ought to be a common Baker.

Trin. 20 Jac.

Whiteguift *verſus* Elderſham.

Second deliverance.

JOhn Whiteguift brought a Writ of ſecond deliverance againſt Richard Elderſham, for taking of his Cattle at Clanding, in quodam loco vocat. Curles-yard. The Defendant makes Conuzance as Baylif to Sir Francis Barrington, becauſe that the place, &c. was parcel of the Mannor of Curles, and that John Curles was ſeiſed before the time, &c. thereof, and held it of Sir Francis Barrington as of his Mannor of Clanding by Knights Service, viz. by Homage, Fealty, & ſervitium ſcuti, and by the Rent of ten pounds, payable yearly at two Feaſts, of which Rent the ſaid Sir Francis was ſeiſed by the hands of the ſaid John Whiteguift, as by the hands of his very Tenant, in his Demeſn as of fee, and Avow pur Homage inſect, whereupon the Plaintiff demur.

Avowry for Homage

And ſhew for cauſe, that the Defendant had not ſhewn any Title to have Homage of the ſaid John, and that the Cognizance is repugnant and no ſufficient Seiſin alledged of the Services, and that the ſhewing of the Seiſin is not formal, vide Bevils caſe, Coke lib. 4. fol. 6. Seiſin of Rent is the Seiſin of the Services, and he might have traverſed the Tenure, and the other party ought to ſhew whether he had done Homage before, vide 44 E.3.41. when an Avowry is upon the Baron for the Homage of the Feme, it is ſufficient Avowry without ſhewing that he had Iſſue by her; and yet if he had not Iſſue, he could not avow upon the Baron, but that ought to come on the other party, vide 5 E. 2. Fitz. Avowry 209. A man avow for Homage, and alledge Seiſin of Eſcuage without Homage, and good.

Seiſin of Rent is Seiſin of Homage.

And after upon motion this Term, Judgment was entred for the Defendant.

Trin.

Trin. 20 Jac.

Sherwells Caſe.

MAry Sherwell brought a Writ of Dower, and in Bar thereto it was pleaded, that the Father of the Husband of the Demandant was ſeiſed of one houſe and ſixty acres of Land in Fee, and made a Feoffment to the uſe of himſelf for life, and after to the uſe of the Husband and the ſaid Mary for their lives, for the Joynture of the ſaid Mary, the remainder to their Heirs: And that afterward the Father died in the life of the Husband, and after the Husband died: And adjudged that this is no Joynture to bar Dower; according to the opinion in Vernons Caſe, becauſe that the Eſtate of the Wife at the Commencement, took not effect immediately after the death of the Husband, Et quod ab initio non valet, tractu temporis non convaleſcit: And if a Feoffment to the uſe of the Baron for life, the remainder to I. S. for years, remainder to the Feme for her Joynture, this is not a Joynture to bar Dower.

Dower.

Joynture which bars Dower. 1 Inſt. 36. b.

Trin. 20 Jac.

Francis Curle *verſus* James Cookes.

AN Action of the Caſe was brought, and Count, that the King by his Letters Patents, An. 12 Jac. reciting the Statute of 32 H. 8. for erecting of the Court of Wards, and the Officers thereof; and that two perſons ſhall be named by the King and his Succeſſors, who ſhall be Auditors of the Land of the Kings Wards: And reciting the Statute of 3; H. 8. for the making of the Maſter of the Wards and Liveries, and his power, had made him the Plaintiff one of his Auditors, and granted to him the Fees due and accuſtomed to be had, and 40. Marks fee, and gave power to him as one of his Auditors, according to the ſaid Statute, and to exerciſe it with the Fees in as ample a manner as others had uſed: And averred that at the time of the Patent made, and at all times after the erection of the ſaid Court, the Auditors had engroſſed all the accounts of the Feodaries, and that they had taken therefore two ſhillings, and ſhewed that he was ſworn and exerciſed that Office, and ſhewed the Oath ſpecially, and that he had by vertue thereof ingroſſed divers Accounts of the Feodaries, and had taken therefore two ſhillings; and that the Defendant having conference with the Plaintiff concerning his Office, and his bone geſture therein, ſaid to him, You have received money for ingroſement of Feodaries (*innuendo* the ſaid Fees for ingroſement of the Accounts of the Receivers, Feodaries, and other Officers aforeſaid) which I will prove is Couſenage: And then and there ſpake further, You are a Couſener (innuendo the ſaid Francis deceipſe Dominum Regem & ſubditos in executione officii prædicti) and you live by Couſenage, & deceptionem dicti Domini Regis & ſubditorum ſuorum in executione officii ſui. Non culp. verdict. pro Plaintiff, and Damages thirty three pounds.

Caſe.

Words.

Of an Auditor of the Court of Wards.

It

It was moved in Arreſt of Judgment by Atho, that firſt it is alledged, that the Fæ of the two ſhillings is lawful, and that he ſaid, You have received monies for ingroſſement of Feodaries, which I will prove is Couſenage (innuendo the Fæs aforeſaid which are lawful) and then by his own ſhewing it is not Couſenage.

Nonſenſe. 2. It is inſenſible, Ingroſſements of Feodaries, for they cannot be ingroſſed, but their Accounts.

3. That Ad tunc & ibidem, for the other words are for other words ſpoken at another time of the ſame day, and they are not actionable; for they do not relate to his Office. Alſo the words will not maintain action, for the word Couſenage is general, and of an ambiguous interpretation, and therefore no action lies for that: And he reſembled it to Sir Edmund Stanhops caſe; He hath but one Mannor, and hath got it by ſwearing and forſwearing: And to the Caſe of Midlemore and Warlow, An. 30 Eliz. Thou art a couſening Knave, and haſt couſened me of forty pounds; And adjudged that no Action lay, vide Coke lib. 10. fol. 130. in Osbornes Caſe, Thou art an arrant Knave, a Couſener, and a Traytor; Action lies only for the word Traytor, and yet all being ſpoken at one time aggravate, and Damages ſhall be intended to be given only for theſe words which are actionable, vide ut ſupra fol. 131. if the words be alledged as ſpoken at ſeveral times, and as ſeveral cauſes of actions, there if the Damages be entire, the Plaintiff ſhall not have Judgment; if any of the words do not bear action.

Midlemore and *Warlow.* 1 Bulſtr. 172. acc.

Stanley and Buddens caſe. And other Caſes were cited that Couſenage is not actionable: And Mich. 40 Eliz. Stanley and Buddens, or Boſwels caſe; there an Attorney brought an Action of the Caſe for theſe words, Thou art a couſening Knave, and getteſt thy living by Extortion, and didſt couſen one Pigeon in a Bill of Coſts of ten pounds: Adjudged that the laſt words were actionable.

This Caſe was adjudged for the Plaintiff, but I was abſent in Chancery, and heard not their reaſons, for it was doubtful.

Hill. 17. Jac.

Empſon *verſus* Bathurſt.

Debt. FRancis Empſon brought an Action of Debt upon an Obligation, againſt George Bathurſt; the Defendant pleaded the Statute of 23 H. 6. That an Obligation taken Colore officii, of any one in their Cuſtody, with any other Condition then for appearance at the day mentioned in the Proceſs ſhall be void: And ſhewed that an Extent iſſued out of the Chancery, to extend the Land of Robert Leigh upon a Statute Staple of twelve thouſand pounds, in which he was obliged to the Plaintiff: And that Anthony Thirrold was Sheriff, and Charles Empſon was under Sheriff, and ſhewn an Extent of the Land returned, and before any Liberate it was agreed that the Defendant ſhould pay to the under Sheriff two and thirty pounds ten ſhillings, and that he ſhould be bound to the Plaintiff his brother, for the ſecurity thereof to the uſe of the ſaid Charles, and thereupon he entred into the ſaid Obligation, which by the ſaid Statute is void, the Plaintiff replied and ſhewed,

Obligation voided by the Statute 23 H. 6. 10.

For money to extend, &c.

ſhewn that by the execution of the Extent he agreed to pay him the ſaid two and thirty pounds ten ſhillings, and pleaded the Statute 29 Eliz. cap. 4. whereupon the Defendant demurred.

And it was adjudged againſt the Plaintiff, for his Obligation is extortion, and Colore officii, and void by the Common Law. Execution per Sheriffs.

Extortion is when any one Colore officii extorquet feodum non debitum, plus quam debitum, aut ante quam debitum, vide Dive and Maninghams caſe, an Obligation made by Extortion is againſt Common Law, for it is as Robbery, vide Coke lib. 10. ſol. 100. Dyer 144. And in this caſe the opinion of the Court was, that no Fee is due to the Sheriff by the Statute of 14 Eliz. cap. 4. becauſe the Fee is not due untill execution, Copulative extent, and delivered in execution, if it were a Statute-Merchant, in which is a Liberate included, then the Fee is due.

Alſo it was agreed that by the Statute the Sheriff ought to have ſix pence in the pound, where the ſumm exceed a hundred pounds for all, and twelve pence in the pound. Sheriffs Fees on Executions. V. Poph. 173. 1 Cro. 287. Latch. 17. 51.

Mich. 20 Jac.

Bullen *verſus* Gervis.

RObert Bullen brought an action of Debt for 12 l. upon an Obligation, againſt William Gervis Adminiſtrator of Owen Godfrey, The Defendant pleaded that the Inteſtate was outlawed at the Suit of Francis Murrell, after Judgment, and pleaded it ſpecially, and being ſo Outlawed died, and that Outlawry is in full force, Judgment ſi Action, whereupon the Plaintiff demurred. Debt. It is no plea, for the Adminiſtrator to ſay, the Inteſtate died outlawed.

8 E. 4. 6. There by Littleton, between Young and Pigot, in an action of Debt againſt Executors, it was holden a good plea to ſay, that their Teſtator was Outlawed, for they are charged to the King for the Goods. Genny ſaid, that the plea amount only to this, that they have not any Goods, and ſo anſwer argumentative. And 21 E. 3. 5. By Brian, in a Writ of Debt brought againſt Executors, it is a good plea to ſay, that their Teſtator was Outlawed, ſans luy inritle. *Young* and *Pigot*.

36 H. 6. 27. By Priſot in Debt againſt one as Executor of Jane, the Defendant ſaid, that the ſaid Jane was his Wife, and demand Judgment ſi action, and it ſeems this is no Plea, becauſe that a Feme Covert may have many things which the Husband ſhall not have, as Choſes in action, and ſhe may make Executors if the Baron agree. And Priſot ſaid, Sir, It ſeems to me that it is no good plea for an Executor to ſay, that his Teſtator died Outlawed, *Cauſa qua ſupra. Quere, car bona materia.*

Upon the reading of the Record it ſeems that it is no plea, for it is only by Implication, and that may be given in evidence. Alſo the Executors or Adminiſtrator may have divers things which are not forfeitable to the King; as if the Teſtator had Mortgaged his Land upon Condition, that if the Mortgagee pay not at ſuch a day to him, his Executors, or his Heirs, a hundred pounds, that then it ſhall be lawfull for him, or his Heirs to re-enter, and after and before the day the Teſtator is outlawed, and makes his Executors and dies, and at the day the Mortgagee pay the money to the Executors, that is Aſſets, and not forfeited to the King. Plea argumentative. What things not forfeited by outlawry.

It was moved in Arreſt of Judgment by Atho, that firſt it is alledged, that the Fæ of the two ſhillings is lawful, and that he ſaid, You have received monies for ingroſſement of Feodaries, which I will prove is Couſenage (innuendo the Fæs aforeſaid which are lawful) and then by his own ſhewing it is not Couſenage.

Nonſenſe. 2. It is inſenſible, Ingroſſements of Feodaries, for they cannot be ingroſſed, but their Accounts.

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This Caſe was adjudged for the Plaintiff, but I was abſent in Chancery, and heard not their reaſons, for it was doubtful.

Hill. 17. Jac.

Empſon *verſus* Bathurſt.

Debt. FRancis Empſon brought an Action of Debt upon an Obligation, againſt George Bathurſt; the Defendant pleaded the Statute of 23 H. 6. That an Obligation taken Colore officii, of any one in their Cuſtody, with any other Condition then for appearance at the day mentioned in the Proceſs ſhall be void: And ſhewed that an Extent iſſued out of the Chancery, to extend the Land of Robert Leigh upon a Statute Staple of twelve thouſand pounds, in which he was obliged to the Plaintiff: And that Anthony Thirrold was Sheriff, and Charles Empſon was under Sheriff, and ſhewn an Extent of the Land returned, and before any Liberate it was agreed that the Defendant ſhould pay to the under Sheriff two and thirty pounds ten ſhillings, and that he ſhould be bound to the Plaintiff his brother, for the ſecurity thereof to the uſe of the ſaid Charles, and thereupon he entred into the ſaid Obligation, which by the ſaid Statute is void, the Plaintiff replied and ſhewed,

Obligation voided by the Statute 23 H. 6. 10.

For money to extend, &c.

ſhewn that by the execution of the Extent he agreed to pay him the ſaid two and thirty pounds ten ſhillings, and pleaded the Statute 29 Eliz. cap. 4. whereupon the Defendant demurred.

And it was adjudged againſt the Plaintiff, for his Obligation is extortion, and Colore officii, and void by the Common Law. Execution per Sheriffs.

Extortion is when any one Colore officii extorquet feodum non debitum, plus quam debitum, aut ante quam debitum, vide Dive and Maninghams caſe, an Obligation made by Extortion is againſt Common Law, for it is as Robbery, vide Coke lib. 10. ſol. 100. Dyer 144. And in this caſe the opinion of the Court was, that no Fee is due to the Sheriff by the Statute of 14 Eliz. cap. 4. becauſe the Fee is not due untill execution, Copulative extent, and delivered in execution, if it were a Statute-Merchant, in which is a Liberate included, then the Fee is due.

Alſo it was agreed that by the Statute the Sheriff ought to have ſix pence in the pound, where the ſumm exceed a hundred pounds for all, and twelve pence in the pound. Sheriffs Fees on Executions. V. Poph. 173. 1 Cro. 287. Latch. 17. 51.

Mich. 20 Jac.

Bullen *verſus* Gervis.

RObert Bullen brought an action of Debt for 121 l. upon an Obligation, againſt William Gervis Adminiſtrator of Owen Godfrey, The Defendant pleaded that the Inteſtate was outlawed at the Suit of Francis Murrell, after Judgment, and pleaded it ſpecially, and being ſo Outlawed died, and that Outlawry is in full force, Judgment ſi Action, whereupon the Plaintiff demurred. Debt. It is no plea, for the Adminiſtrator to ſay, the Inteſtate died outlawed.

8 E. 4. 6. There by Littleton, between Young and Pigot, in an action of Debt againſt Executors, it was holden a good plea to ſay, that their Teſtator was Outlawed, for they are charged to the King for the Goods. Genny ſaid, that the plea amount only to this, that they have not any Goods, and ſo anſwer argumentative. And 21 E. 3. 5. By Brian, in a Writ of Debt brought againſt Executors, it is a good plea to ſay, that their Teſtator was Outlawed, ſans luy inritle. Young and Pigot.

36 H. 6. 27. By Priſot in Debt againſt one as Executor of Jane, the Defendant ſaid, that the ſaid Jane was his Wife, and demand Judgment ſi action, and it ſeems this is no Plea, becauſe that a Feme Covert may have many things which the Husband ſhall not have, as Choſes in action, and ſhe may make Executors if the Baron agree. And Priſot ſaid, Sir, It ſeems to me that it is no good plea for an Executor to ſay, that his Teſtator died Outlawed, *Cauſa qua ſupra. Quere, car bona materia.*

Upon the reading of the Record it ſeems that it is no plea, for it is only by Implication, and that may be given in evidence. Alſo the Executors or Adminiſtrator may have divers things which are not forfeitable to the King; as if the Teſtator had Mortgaged his Land upon Condition, that if the Mortgagee pay not at ſuch a day to him, his Executors, or his Heirs, a hundred pounds, that then it ſhall be lawfull for him, or his Heirs to re-enter, and after and before the day the Teſtator is outlawed, and makes his Executors and dies, and at the day the Mortgagee pay the money to the Executors, that is Aſſets, and not forfeited to the King. Plea argumentative. What things not forfeited by outlawry.

So if Tenant for life of a Rent be outlawed, and the Rent arrear, and makes his Executors and die, this arrerage is due to the Executor, and is Aſſets, and not aforfeited, for the Rent was a Free-hold, for which during his life no action of Debt lay, and theſe arrerages recoverable by the Executors are Aſſets.

Alſo if this ſhould be a good plea, which is only by Implication, he might thereby prevent the Plaintiff of his recovery,

Alſo though choſes in action are by information in the Exchequer recoverable, yet if the Executor bring a Scire facias upon the Judgment, he ſhall recover, and ſhall be accountable to the King therefore, and the Debtors of the Inteſtate (though he was outlawed) may pay the debts to him, and his releaſe is a good diſcharge to them.

Alſo it was agreed, that an Executor or an Adminiſtrator might bring a Writ for the reverſall of the outlawry, and the Outlawry is not a Bar to him. And one caſe was vouched by Atho, which was adjudged upon the like plea, in this Court, Trin. 37 Eliz. Rot 2954. Woolley againſt Bradwell and his Wife, Executors of Sir Thomas Mannord, and the matter depended a year and was argued, and adjudged that it was no plea, for it is but by argument, and ſo being, Lord Hobart ſaid, this Argument ought to be infallible; alſo this is the matter and not the form, for in this caſe the Demurrer was generall: and the Book of 3 H. 6. 14. & 32. there it is well argued, and the better opinion, that it is only by argument: And a man outlawed may make an Executor, and this Executor may have a Writ of Error to reverſe the Outlawry: And thereupon and upon the view of the Record in Woolleys caſe, the Court gave Judgment that it is no plea,

Woolley verſus Bradwell. Trin. 37 Eliz. Rot. 2924.

One outlawed may make Executors.

Lightfoot *verſus* Brightman.

Covenant.

Grant of an Advowſon pleaded without alledging to be by deed, good if the iſſue be taken upon collateral matter.

Lightfoot brought an action of Covenant againſt Brightman, and count, that the Defendant being poſſeſſed of an Advowſon in groſſe for tearm of years, covenanted that he would not grant nor aſſign his Intereſt to any, without offer thereof firſt to the Plaintiff, and that he ſhould have it fifty pounds better cheap then any other, and alledge breach of the Covenant, that he granted the ſaid Advowſon and his tearm therein over, without offering it to the plaintiff, and Iſſue joyned upon non conceſſit, and found by the Verdict quod conceſſit, and damages fifty pounds. And it was moved in Arreſt of Judgment, that it is not alledged, that the grant upon which the Iſſue is joyned, was by Deed, and then no breach aſſigned: I at the firſt was of opinion that the Judgment ſhould ſtay, but after upon adviſement, I concurred with Lord Hobart, and Juſtice Winch, that it was helped by the Verdict, for now it being a perfect Grant, it ſhall be intended that upon the Evidence a Deed was ſhewn; as upon Iſſue joyned upon Grant of a Reverſion, where it is not alledged that it was by Deed, or that the Tenant attorned, yet if it be found it ſhall be good, And ſo in Advowry for a Rent-charge, where the Grant thereof is pleaded not by Deed, and Iſſue is joyned ſur conceſſit, and found quod conceſſit, that is good by the Verdict, like to Nichols caſe, Coke lib. 5. Debt upon a Bill, payment pleaded, and Iſſue found for the Plaintiff, he had Judgment: But it ſeems, if it had been found for the Defendant, the Plain-

Cook Lib. 9. 15. b accord. Crook. 482.

tiff ſhall have Judgment, for the Bar confeſſe the action, as in the 9 H. 6. Debt upon an Obligation, the Defendant plead that he delivered it to the Plaintiff to be his Deed, when certain Conditions were performed: And he pleaded that the Conditions were not performed, if it be found accordingly, yet the Plaintiff ſhall have Judgment, Coke lib. 2. fol. 61. Wiſcots caſe, a Leaſe by Baron and Feme, which ought to be by Deed pleaded generally, and found the Plaintiff had Judgment, vide Smith and Stapletons caſe.

Mich. 20 Jac.

Chittle *verſus* Sammon.

Replevin. Avowry for Rent granted to the Father in fee, without alledging that it was arreare after the death of the Father.

CHittle againſt Sammon in Replevin, Conuſance for Rent as Bayliff to Sir John Reves, upon a Grant out of the Land, whereof the place in which, &c. was parcell, upon a Grant made to the Father of Sir John, and for Rent arrear, &c. Iſſue was joyned upon this point, if the place was parcell of the Land out of which the Rent was granted, and found by Verdict that it was: and now moved by Atho in Arreſt of Judgment, that it is not alledged that this Rent was arrear after the death of the Father, as it ought to be, and therefore it may be intended that this Rent was arrear in the life of the Father. But the Court agreed and reſolved that it was good after Verdict, for now it is pleaded that it was arrear, and not paid to him, Ergo it was due to him; and though it might have been more fully pleaded, yet after Verdict it is ſufficient. Verdict helpes.

Fletcher *verſus* Harcot.

Caſe. Aſſumpſit in conſideration that the plaintiff (being an Hoſtler) would keep a Priſoner to ſave him harmleſſe.

AN action upon the caſe was brought by Fletcher of Otely againſt Harcot, and count, that whereas the Defendant had arreſted one Batersby by a Commiſſion of rebellion, iſſuing out of the Court of the Lord Preſident and Councell of the North, as he affirmed: And whereas the Plaintiff keps a common Inne in Otely, and had kept it by the ſpace of five years and had entertained men. The Defendant requeſt the Plaintiff to keep the ſaid Batersby in his Inne at Otely, by the ſpace of one night, as a Priſoner, and that he would keep and ſave him harmleſſe, and ſhew that he had kept him for that night as a Priſoner: And Batersby afterward brought an action of falſe Impriſonment againſt him for the ſaid keeping of him in his houſe, and that he had expended and laid out in defence thereof ten pounds: And that he had required him to ſave him harmleſſe, and he refuſed. Non aſſumpſit found for the Plaintiff, and moved by Harvey in Arreſt of Judgment, that it is no ſufficient conſideration, becauſe it doth not appear that he had lawfully arreſted the ſaid Batersby, for it is not affirmatively alledged, but (as he ſaid.) Alſo it doth not appear that the recovery in the action of falſe Impriſonment was for the ſame cauſe; but in that he had miſinformed, for it was in Record Pro cuſtodia prædicta, & ex cauſa prædicta. And for the other matter the Lord Hobart

Hobart ſeemed at firſt to doubt, if it did not appear that it was a lawfull Arreſt, then there was no conſideration: But becauſe the diverſity is when the conſideration appears to be for doing of a thing which is unlawfull; As if one at the requeſt of I. S. promiſe to beat I. D. and he promiſe to ſave him harmleſſe, this is a void Conſideration; But if one requeſt I. S. to enter into the Manno^r of Dale, and drive out Cattle, and that he will ſave him harmleſſe if he doth ſo, and after Treſpaſſe be brought againſt him, and recovery had, he ſhall have his action: So if a Sheriff pretending to have a Writ, where he hath none, arreſt one, and requeſt an Inn-keeper to entertain him in his houſe, or hire one to conduct the Priſoner to the Gaol; and promiſe to keep him without Damage; if an Action be brought, and recovery had thereupon, the party ſhall have an action of the caſe againſt the Sheriff upon this promiſe, for he which doth a thing which may be lawfull, and the illegality thereof appear not to him, he which implors the party and aſſume to ſave him harmleſſe, ſhall be charged: And Judgment was entred for the Plaintiff.

Conſideration to do a thing lawfull unlawfull.

Mich. 20 Jac.

Parkers Caſe.

Debt. Hue and Cry.

AN action of Debt was brought againſt the Hundred of in the County of Stafford, by William Parker, upon the Statute of Wincheſterr, cap. 1, & 2. reciting the Statute, That foraſmuch as Robberies do daily encreaſe, Murthers, and burning of houſes, and Theft be more often uſed then they have been heretofore, and Felons cannot be attainted by the Oathes of the Jurors, which had rather ſuffer ſtrangers to be robbed, and to paſſe without pain, then to indite the Offenders, of whom great part be folk of the ſame Countrey, &c. And upon Nil debet pleaded, it was found for the Plaintiff: And it was moved by Serjeant Bawtry, that the Writ had recited the Statute otherwiſe then it was, for the Writ ſaies, Indicari pro indictari, and it ought to be written by this Abbreviation Indicări: And the word Indictari is a word by it ſelf, and he reſembled it to Freemans caſe Coke lib. 5. fol. 45. Fecit vaſtum vendicõnem & deſtrictionem, for deſtructionem and not amendable. Alſo Coke lib. 4. S. Cromwells caſe upon the Statute of Rich. 2. de ſcandalis magnatum, the word Meſſoignes is ſaid Meſſuages, and not amendable. Harris anſwered that the Curſitor had a Note drawn which was well; and it was only his miſ-priſion.

Amendment of a falſe Abreviation in a writ.

Amendment of falſe Latine.

Secondly, that there is no ſuch Paſſive Verb as Indicari, and ſo being inſenſible, ſhall be amended: And for that vouched 11 H. 6. 2. & 14. adjudged upon the Statute of forging of falſe Deeds, Imaginavit, where it ſhould be Imaginatus eſt, and amended.

3. This Abbreviation is ſufficient: Alſo he ſaid that it is only the preamble of the Statute, whereupon the action is not founded, but upon the body of the Act. Sir George Wrothies caſe in Ejectment, the word Demiſit was amended and made Diviſit.

Amendment by Inſtructions of the Curſitor.

Brickhead againſt the Biſhop of Yorke, and Cook for the Vicaridge of Leeds, the Writ was Vacariam, and for that the Curſitor was examined

mined, and his Inſtruction being Vicariam, it was amended there, An. 14 Jac.

1. The Lord Hobart inclined ſtrongly, that it ſhould be amended by the inſtruction which was delivered to the Curſitor, but as to that Winch and I differed, becauſe that this matter of Inſtruction is not a thing which ought to be informed by the party, as all matters of fact are: As whether it be a Vicaridge or a Church, or in debt for twenty pounds in the Inſtruction, and he make it thirty pounds, that ſhall be amended: But in this caſe it is matter of ſkill, and no difference between this caſe and Freemans caſe: And in debt if he had Inſtruction in the Debet and Detinet, and makes the Writ in the Detinet only, that ſhall not be amended.

2. The Lord Hobart inclined, that this recital is but in the Preamble, and may be omitted; to which we diſagreed, he inclined that the Abbreviation was ſufficient to ſupply all the word.

This Caſe being long debated, the Court *Ex aſſenſu* Ordered, that the Defendant ſhould give 80 l. to the Plaintiff.

Mich. 10 Jac. Rot. 641.

Poole *verſus* Reynold.

Prohibition. Preſcription to have Deer out of a Park in diſcharge of all Tithes, and after the Park is diſparked.

JOhn Poole brought a Prohibition againſt Richard Reynold Farmer of the Moiety of the Rectory of Colleton, with the Chappel of Shute annexed to the ſaid Rectory: And the Surmiſe was, that of time whereof memory, within the Pariſh of Colleton, there was a Rectory appropriate, and the Chappel of Shute annexed thereto, Et una Vicaria perpetua ejuſdem Eccleſiæ de Colleton dotat.

And whereas the ſaid John Poole for ſix years laſt paſt, had occupied one houſe, a hundred acres of Land, twenty acres of Meadow, forty acres of Paſture, called Shute Park, in Shute aforeſaid, within the Pariſh of Colleton; which ſaid Tenements were anciently a Park, and now diſparked, which Park De temps d'ont memory, &c. until the diſparking thereof was uſed and filled with Deer, and ſevered from other Land, and was diſparked, An. 10 Eliz. and converted into the ſaid houſe, a hundred acres, &c. And that all the Occupiers of the ſaid Park called Shute Park, de temps d'ont memory, &c. until the diſparking, had paid to the Vicar there, his Farmer, or Deputy one Buck of the Summer ſeaſon, within that time upon requeſt, and one Doe of the Winter ſeaſon, within that time, &c. in diſcharge of all Tithes of the ſaid Park, until the diſparking; and after the diſparking in diſcharge of all Tithes of the ſaid Tenements, which they had accepted for all the time aforeſaid, until the diſparking and after, or otherwiſe agreed with the Vicar for them: And traverſed this Preſcription, and found for the Plaintiff.

And now in Arreſt of Judgment it was moved by Henden, that this Preſcription extends to the Land quatenus it is a Park, and that being deſtroyed, the Preſcription is gone, for a Tenure to cover a Wall, or Thatch an houſe, if the party deſtroy or pull it down, the Tenure is extinct, 32 E. 4. Avowry: And it ſhall be preſumed that this was by grant when it was a Park, which is collected by the thing which is to be paid; and if it be to be paid or delivered out of the Park, then it is determined, vide Luttrels caſe, Coke lib. 4. Alſo this Preſcription is againſt the benefit of the Church, and ſhall not be enlarged; And the Wood which is ſold out of the Park ſhall not be diſcharged, 14 Jac. in Conyers caſe in this Court; Preſcription that the perſon had two acres of Meadow given in diſcharge of all Tithes of Hay ground, viz. of all the Meadow in the Parish, if any arrable Land be converted into Meadow, it extends not to diſcharge that, vide Luttrels caſe, Coke lib. 4. fol. 86. That an Alteration in prejudice of the party determine the Preſcription; but vide the principal caſe there adjudged, that building of new Mills in the ſame place, and converting of Fulling Mills into Corn Mills, alter not the Preſcription, vide Terringhams caſe, lib. 4. He which hath Common purchaſed part of the Land, all is extinct, for it is his own act: And he cited a caſe which was in this Court argued at Bar, and afterwards at Bench, between Cooper and Andrewes, Mich. 10 Jac. Rot. 1023. for the Park of Cowhurſt, vide 32 E. 1. Fitz. avowry 240. 5 E. 2. Fitz. annuity 44. 20 E. 4. 14. 14 E. 4. 4. But this caſe was adjudged for the Plaintiff, Quod ſtet prohibitio, and that which is by the name of Park is for the Land, and is annexed to the Land by the name of Park; if the Preſcription had been to pay a Buck or a Doe out of the Park, then it would alter the caſe: But it is general, and had been paid alſo after the Park diſparked, viz. the tenth of Eliz. And the caſe of Cowper and Andrewes, was the third ſhoulder of every Deer which is killed in the Park, and two ſhillings in money, and that caſe was never adjudged.

Conyers caſe.

Hob. 39.

Note, That the Caſe of *Cooper* and *Andrewes* was never adjudged, the Court being divided two againſt two. V. Moore 863. and after adj. contrary to the Opinion of *Hob.* vide *Moore* 909.

Hii. 10 Jac.

Meredith *verſus* Bonill.

Caſe.

Words.

Suppoſititious.

HUgh Meredith a Juſtice of Peace in the County of Monmouth, brought an action upon the caſe againſt Bonil, for theſe words, I will have him hanged for robbing on the High-way, and for taking from a man five pounds and an Horſe. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the words were not actionable, for they are not Affirmative or Poſitive, but a ſuppoſition only; as if he had ſaid, I will indite him for ſuch a matter: it was vouched to be adjudged 31 Eliz. in Nowels caſe, that to ſay of an Attorney, That he was Cooped for forging Writs, maintain an action; And 14 Eliz. He is infected of the Robbery, and he ſmelleth of the Robbery, adjudged actionable.

Nowels caſe.

In Balls caſe, There is never a Purſe cut in Northamptonſhire but Ball hath a part of it, will not bear an action: But the Court would not declare their opinion, Quia ſub ſpe Concordiæ.

Griggs

Griggs Caſe.

GRigg which is the Examiner at Cheſter, preferred there his Bill in the Chancery, vocat. the Exchequer, againſt one which inhabite within the ſaid County, and another which inhabite in London, being Executors to one, to whom the ſaid Grigg was indebted by Obligation (which Obligation was put in ſuit in the Court of Common Pleas, and there proceed to proceſs before the Bill exhibited) and the Bill concern equity of an Agreement, that the Teſtator had promiſed, that one Robert Grigg ſhould aſſign a leaſe of Tithes to the Plaintiff in conſideration of his entry into the ſaid Obligation; and if he could not procure it, that then the Obligation ſhould not be prejudicial to him; and he which was inhabiting in Cheſter anſwered thereto: And an Order was made by Sir Thomas Ireland, Vice-Chamberlain, that Proceſs ſhould be awarded to him which dwelleth in London; And an Injunction was granted to ſtay the proceedings at Common Law: And afterwards upon the motion of Serjeant Hitcham, Sir Thomas Ireland was in Court, and ſhew all that he could to maintain the Juriſdiction, viz. That the Contract was made in the County Palatine, and that the priviledge purſued the Plaintiff; and ipſe qui eſt reus, non poteſt eligere, &c. Yet it was reſembled to ancient Demeſn and Guildable: And by Lord Hobart, he which inhabite at Dover by this way, may be inforced to come and anſwer to a Bill in Cheſter, which would be infinite trouble, and the matter is tranſitory: And it was reſolved, that the Court of Cheſter had not power in this caſe, but it belonged to the Chancery of England.

And a Prohibition was granted.

Prohibition at *Cheſter* for tranſitory matters.

Hil. 20 Jac.

A Caſe was in the Kings Bench, viz. Baron and Feme brought an action of Treſpaſs Quare clauſum fregit, and for Battery of the Feme, the Defendant pleaded a Licenſe to enter into the Cloſe made by the Baron; and not guilty as to the Battery. And the Court was moved in Arreſt of Judgment, becauſe the Husband and Wife could not joyn for the breaking of the Cloſe of the Baron, the Writ ſhall abate for all: But the Lord chief Juſtice and Juſtice Dodderidge were of opinion, that the Plaintiff ſhould have Judgment: And it ſeems that the Law is clear accordingly, vide 9 E. 4. 51. Treſpaſs by the Husband and Wife for the Battery of them both, the Jury found ſo much for the Battery of the Husband, and ſo much for the Battery of the Wife, and ſo Damages aſſeſſed ſeverally, becauſe the Wife could not joyn with the Husband in an action for the Battery of the Husband, for that part the Writ ſhall abate; and for the Battery of the Wife they ſhall recover, for, for that they ought to joyn in an action, vide 46 E. 3. 3. Baron and Feme brought Treſpaſs for the Battery and Impriſonment of the Wife, and the Writ was ad damnum ipſorum, and yet good, vide 9 H. 7. in the caſe of Reſcous, and 22 E. 4. 4. there is a good diverſity when the Writ is falſified by the ſhewing of the

Treſpaſs.

Treſpaſs by Baron and Feme, for breaking the Cloſe of the Baron, and for the battery of the Wife.

Abatement for part.

the party himſelf; and when it is found by Verdict. And Juſtice Heughton and Juſtice Chamberlain were of opinion, that the Writ ſhould abate; for it is apparent, that as to the Treſpaſs Quare clauſum fregit, the Wife had no cauſe of action: But this caſe being debated at Serjeants Inne in Chancery Lane, at the Table, the Lord chief Baron was of opinion that Plaintiff ſhould have Judgment for that part, and he held the Writ good in part, and Reddenda ſingula ſingulis, Mes c' neſt iſſint, as it ſeems no more than in the caſe of 9 E. 4. for there the Writ ſhall abate for part. And if an action of forgery of Deeds be brought againſt two, for forging and publiſhing, and found that one forged and the other publiſhed, the Plaintiff ſhall have Judgment.

Verdict helps.

Howell *verſus* Augur.

Treſpaſs.

IN an action of Treſpaſs brought by Noy Howell againſt Augur, for breaking of a houſe and five acres of Land in Freſham, upon Non Culp. pleaded, the Jury gave a ſpecial Verdict.

Deviſe of a Fee after a Fee.

Robert Howell ſeiſed of the Land in Queſtion, and of other Land, by his Will in writing deviſed this Land to Dorothy his Wife for life, and deviſed this Land to Thomas Howell his younger Son, to him and his Heirs in Fee, under the Condition which ſhall be afterwards declared: And the other Land was alſo deviſed to Dorothy for life, and to the Plaintiff and his Heirs in Fee, under the Condition hereafter limited: If Dorothy died before the Legacies paid, then he will that they ſhall be paid by Noy and Thomas his Sons, portion-like out of the Houſes and Lands given them: And if either of my Sons die before they enter, or before the Legacies paid, or before either of them enter; Then I will that the longer liver ſhall enjoy both parts to him and his heirs: And if both die before they enter, then his Executors or one of them to pay the Legacies, and to take the profits till they be paid, and a year after, and made Dorothy his wife, and Chriſtopher Noys his Executors, and died. Dorothy entred, the Plaintiff Noy by his Deed, An. 33 Eliz. in the life of Dorothy releaſed to Thomas all his right, &c. with warranty: Thomas by his Will deviſed the Land, for which the Action is brought, to Agnes his wife, and died in the life of Dorothy, and before Legacies paid Dorothy died, and Agnes entred and took to husband Henry Aplepard, who leaſed to the Defendant, upon whom Noy entred, and the Defendant re-entred: And *Si ſuper totam Materiam, &c.*

Condition in a Will.

Releaſe of Lands deviſed before they be veſted.

And this Caſe was well argued at Bar in two Terms; and the firſt queſtion was, If this Deviſe of a Fee after a Limitation be good or not, much was ſaid for it, and they relied upon a caſe which was adjudged in the Kings Bench, between Pell and Brown, of ſuch a limitable Fee: And many Caſes put that this operate as a future Deviſe Executory, as well as one may by his Will Deviſe, that if his Son and Heir die before he marry, or before that he come to the age of four and twenty years, that then J. S. ſhall have the Land, and it ſhall be good, vide Dyer 33. Coke lib. 10. 46. Lampets caſe.

Pell and *Brown.* 2 Cro. 550.

But

But Tuesday the eleventh of February, the Lord Hobart by our direction (because that we were streightned of time, and Howell was so importunate for Justice, that we could not argue) delivered the opinion of the Court, that Judgment should be given for the Defendant: And he declared, that as to the point of Fæ-simple, which he called the mounting of one Fæ-simple upon another, we now declared no opinion; But we all without difficulty resolved, that this release of Noy, be it a Condition or not, had discharged it: And as to him, it is an Interest vested by the Devise, but not executed until it happen: And therefore in Lampets case, there the Release discharged it, for there he had no Title executed, but vested and commenced, and so may have Noy Howell the Plaintiff in this case; and it is not like to an Heir in the life of the Father, for he is a stranger, and he hath no Title at all, and yet his Release with Warranty bars him; and here this Release is accompanied with Warranty, of which nothing was spoken: Also as to Noy it is a Condition according to the words of the Will, and therefore sans question that Noy had barred himself.

The Vacation after Hil. 20 Jac.

MEmorand. That on Munday the seventeenth of February, at Serjeants Inn, upon the assembly of all the Justices, to take consideration upon the Statute of 35 Eliz. cap. 1. for the Abjuration of Sectaries; the Attorney General, and Serjeant Crew being there, after the perusal of the Statute, and the Continuances thereof, it was first upon debate considered, whether this Statute was in force, or discontinued, and upon the perusal of the Proviso in the Statute of Subsidy, and upon reasoning the matter, these Points were resolved.

35 Eliz. c. 1. Resolutions upon the Statute of Eliz. c. 1. concerning Sectaries.

1. If a Parliament be assembled, and divers Orders made, and a Writ of Error brought, and the Record delivered to the higher House, and divers Bills agreed, but no Bills signed: That this is but a Convention, and no Parliament, or Session, as it was An. 12 Jac. in which (as it was affirmed by them which had seen the Roll) it is entred that it is not any Session or Parliament, because that no Bill was signed, vide 33 H. 6. Brook, Parliament 86. every Session in which the King signs Bills is a Parliament.

What shall be said a Session of Parliament. 4 Inst. 28.

2. It was agreed, that if divers Statutes be continued until the next Parliament, or next Session, and there is a Parliament or a Session, and nothing done therein as to continuance, all the said Statutes are discontinued and gone. Then it was moved, whether this Statute was discontinued, & Seriatim, Jones, Chamberlain, Hutton, Denham, Haughton, Dodderidge, Winch and Bromley declared their opinions, that this Statute is discontinued: And that the Statute of Subsidy is a Parliament, and that every Parliament is a Session, but not è converso, for one Parliament may have divers Sessions, as the Parliament 1 Jac. had four, and ended An. 7 Jac. vide 33 H. 6. Br. Parliament 86. And that this Proviso is not to any other purpose, but to continue their proceedings in the same Estate, as if this Act had not been made; and if this Proviso had not been, then this Statute had been discontinued

nued by this act of Subsidy, but when this ends and is determined, then is the Session ended, then it is a Session, scilicet a Parliament; which ought to be pleaded, at the Parliament holden, &c. and all the Commissions of Subsidy are accordingly; and the Proviso call it a Session: Then this being done, the Lord chief Baron did not deliver any opinion, for he said, that he had not considered the Statute; and afterward it was desired that the Lords would deliver their opinions, and thereupon the Lord Hobart declared his opinion accordingly: That it seemed to him that it was a Session, and that it was not safe to meddle with such Law, and that he would never refuse to declare his opinion with his Brethren; After the Lord chief Justice Ley made a long discourse, concerning the purpose and intent of Parliament, scilicet, That it was not their purpose to destroy so good Laws, and therefore it was not any such Session as was within the intent of the preceding Parliament, which was, that these should determine when it is a Parliament or Session, in which good Laws are made.

Acts of Parliament by whom to be judged as to Validity or Continuance.

And Doderidge said, that it was fit to see the Commission, and that that which hath been said, was not to bind any one, but every one spoke what then he was advised of, and peradventure might change upon better consideration. And afterwards upon Tuesday on an Assembly of the two chief Justices, the chief Baron, Justice Haughton, Baron Denham, Hutton, Chamberlain, and Jones, the Attorney-General brought the Commission de 12 El. June 1. and that had these words, Pro eo quod nullus Regalis Assensus, nec responsio per nos præstat. fuit, nullum Parliamentum, nec aliqua Sessio Parliamenti lata aut tent. fuit, They have power to adjourn this Parliament thus begun: And the Commission to dissolve this Parliament, 28 Feb. An. 19 Jac. had the same words, saving that he recite, that he had given his Royal assent to an act of Subsidy, by which was intended that it should not be a Session: And upon view of the Commission, the Lord chief Justice moved that the King was mistaken in this, that he had given power to dissolve this Parliament, which had not any Session, and if it be a Session, then he had no power to dissolve it, and then it is, as it were, a recess; and a Parliament cannot be discontinued, or dissolved but by matter of Record, and that by the King alone; and if the Parliament yet continue, then this Statute also continue during the Parliament by the Proviso: but that would not serve, for first, it is against the intent of the King, and against his Proclamation: And also the case is truly put in the Commission, as to the matter in fact, and he is not misinformed, but mistaken in the Law, and then the Commission for the dissolving is good, semblable to the Lord Shandoi's Case, and other Cases, vide in Cholmleys case: But because that all the Judges were not at this Conference, therefore it was deferred until the next Term; and in the interim, the Grand Secretary and the Attorney General were to inform the King that the Statute is obscure, and had not been put in ure, and that we could not agree.

Parliament dissolved or not.

Mich.

Mich. 20. Jac. Rot. 2805.

Bawtry *verſus* Skarlet.

Suſſex.

JOhn Bawtry Clerk, brought an action upon the Caſe againſt Benjamen Skarlet, one of the Attorneys of this Court by Bill, and count, that whereas one William Carter, Trin. 20 Jac. brought an action of debt againſt the now Plaintiff, upon an Obligation of a hundred and twenty pounds, to which the now Plaintiff appeared by his Attorney, and required a Declaration, and the now Defendant on the part of the ſaid William Carter his Maſter gave the ſaid Declaration, and required the now Plaintiff to confeſs the action; and pendente Pl. he the now Defendant in conſideration that the Plaintiff would give order to his Attorney to confeſs the action, and to ſuffer the ſaid Defendant to have Judgment in the ſaid Plea, for the ſaid William Carter his Maſter, aſſumed to the Plaintiff; that no Judgment ſhould be entred, until after Craſt. Annunciat. And that no execution ſhall be ſued out until after the end of Michaelmas Term next, and ſhew the performance thereof by him, and the breach of the Defendant: And after Verdict it was moved that it was no ſufficient conſideration, and that was impoſſible for him to perform, that Judgment ſhould not be entred in the Term, in which Judgment is given, but that is in the diſcretion of the Court, and afterwards Judgment was given for the Plaintiff.

Caſe. Aſſumpſit. In conſideration that the Plaintiff will confeſs Judgment, the Attorney promiſe to defer the entry of the Judgment, &c.

Paſch. 19 Jac. Rot. 3014. 21 Jac.

Jennings *verſus* Pitman.

RIchard Jennings brought an Action of Covenant againſt George Pitman, upon an Indenture of an Apprentiſhip, by which the Defendant had put himſelf to be an Apprentice to the Plaintiff in Ipſwich, to the Trade of a Linner Draper; and there were divers clauſes in the Indenture, according to the uſual form, and aſſign for breach, the waſting of ſeveral ſums of money.

Covenant of an Apprentiſhip.

The Defendant pleaded the Statute of 5 Eliz. by which it is enacted, That it is not lawful for any one inhabiting in any City or Town Corporate, uſing the Trade of a Merchant over the Sea, Mercer, Pannary, Goldſmith, Iron-monger, Imbroyderer, or Clothier to take any Apprentice to be inſtructed in any of theſe Trades, if it be not his Son, or that the Father or Mother of ſuch Apprentice, had at the time of the taking of him, Lands, Tenements, or Hereditaments, of Inheritance or Freehold, of forty ſhillings per annum, to be certified by three Juſtices of Peace, under their Hands and Seals where the Land lies, to the Mayor, Bayliffs, or other head Officer of the City or Town Corporate, and to be inrolled, entred, and recorded there, and pleaded the clauſe of the Statute which makes Obligations and Covenants void, which are taken againſt it. And averred that Ipſwich was a Town Corporate at the time of the making of the Statute.

5 Eliz. 4 about Apprentices in Corporations.

The

The Plaintiff replied, That his Father had at that time when he was bound, Lands and Tenements in great Bealing, viz. ten acres, to the value of forty ſhillings per annum.

The Defendant by Rejoynder offer to joyn Iſſue, that his Father had not Lands, &c. whereupon the Plaintiff demurred.

And the queſtion was, If this part of the Statute, To be certified by the Juſtices, &c. be ſuch an eſſential part thereof, that the Covenant be void without it: It was agreed, that it had not been put in uſe after the Statute; but it ſeems that it is Eſſential, and it ought to be ſo, at the time when he is put to be an Apprentice, but it may be enrolled afterwards, for the Statute in another part provides a penalty for the not Inrolling: Like to the Caſe upon the Statute of 18 Eliz. That they which claim any Eſtate of them which were Attainted in the Rebellion, they brought their Conveyances to the Exchequer to be inrolled within one year, if they bring and deliver theſe Conveyances, though they be not inrolled, yet they have performed as much as was in them: And if the Certificate be not at the time when the party is put to be an Apprentice, the Statute was to no purpoſe.

If this Bar be good, then the Replication is a departure, and the Rejoynder alſo, and the Bar being good, Judgment ſhall be given againſt the Plaintiff, but if the Bar be not good, then for the Plaintiff, for the Count contains matter certain.

But the Court moved, whether this Covenant lay againſt an Infant, for although it is by the Statute provided, that he ſhall be bound to ſerve as a man of full age, yet that makes not the Covenants good, and it is like to a Cuſtom, which ſhall be taken ſtrictly.

Infant Apprentice how bound.

Trin. 20 Jac.

This Caſe between Jennings and Pitman was moved this Term; And the Lord Hobart was of opinion, that this Statute (being that it appears that he was within age, ſcil. ſixteen years) will not bind him to any Covenants which are not implyed in the Indenture of ſerving: For the doubt was, whether an Infant was an Apprentice out of London, though that he put himſelf to ſerve: And the only matter which binds him in this Statute, is, that he ſhall be bound to ſerve, when he is bound by Indenture, being within age, as well as if he were of full age; and if the Covenant be only a Covenant to ſerve, no Covenant lies for Imbezilling of Goods: And if the Covenant be to ſerve him faithfully and diligently, that ſhall not bind him upon this Covenant. And I was of the ſame opinion, for it is only made good as to the ſerving; and there are many Covenants and Clauſes beſides in this Indenture, which bind him not; As not to play at unlawful Games, &c. And a Cuſtom, that an Infant at ſuch an age may ſell his Land, ſhall be taken ſtrictly, viz. that he cannot give it, &c. But my Brother Winch was of opinion, that it was a thing incident, and quaſi Conſequent, viz. That if he ſhall be bound to ſerve, by conſequence he ſhall be bound to ſerve faithfully and truly. He reſembled it to the caſe of a Fine levied by an Infant, and not reverſed during his Nonage, that ſhall bind him; and by conſequence the Indenture which leads the uſes of the Fine, and when the Law enables to any thing, that which is incident, and without which the other thing cannot be, is implyed.

As to ſervice and collateral Duties.

1 Cro. 179. acc.

Trin.

Trin. 19 Jac. Rot. 1734.

Blemmer Haſſet *verſus* Humberſtone.

Norf.

IN an Ejectione firmæ brought by Ralph Blemmerhaſſet againſt William Humberſtone for the Land in Pucklethorp, upon a Leaſe made by John B. upon a ſpeciall Verdict found, it was reſolved, that when a Copyholder bargain and ſell his Copphold to the Lord of a Mannor, which hath the Mannor in Leaſe for years, that thereby the Copphold Eſtate is extinguiſhed: And the Lord Hobart ſaid, that if a Copyholder come into Court, and ſaies, that he is weary of his Copphold, and requeſt the Lord to take it, that is a Surrender; for between the Lord and the Tenant, a Conveyance ſhall not need to be according to the Cuſtome, for the Copyholder hath no other uſe of the Cuſtome, but only to convey the Land to another, vide Coke lib. 4. That a Releaſe by him which hath Right to a Copphold, to one which is admitted Copyholder, extinguiſheth the Right of the Copphold by Deed: And if a Copyholder releaſe to the Lord, that extinguiſheth the Copphold, although it be contrary to the nature of a Releaſe to give a poſſeſſion. It was agreed here that this Copphold is not extinct, but the Lord (which is Leſſee for years) Dominus pro tempore, may grant it by Copy de novo.

Ejectione firmæ

A Copyhold may be extinguiſht without an actuall ſurrender.

Surrenders in Laws.

Extinguiſhment and not

Mich. 21 Jac.

Aris *verſus* Higgins.

ARis brought an action upon the caſe againſt Higgins for ſaying theſe words He is a Theef and hath ſtoln my Corn, and made me no ſatisfaction: And it was found for the Plaintiff, and afterwards moved in Arreſt of Judgment, that theſe words were not actionable, for Verba ambigua in mitiori ſenſu ſunt accipienda: And therefore Coke lib. 4. fol. 19. Thou art a Thief, for thou haſt ſtoln Apples out of my Orchard, or thou haſt robbed my Hop ground; the latter words qualifie the generality of the former: Alſo an Innuendo will not make either the perſon or the matter certain, Coke lib. 4. fol. 20. Barham did burn my Barn, *Innuendo* a Barn with Corn not actionable; and that he had not ſatisfaction, that proves that it was for Corn growing, for otherwiſe if it were Felony the party ſhall not have ſatisfaction: But Juſtice Winch was of opinion, that the action lay, and that the words, He is a Thief, he hath ſtoln my Corn, are both actionable, and not like to Robbing my Orchard, or ſtealing my Apples in my Orchard, for Apples in an Orchard are commonly upon the Trees: And as to the words, Thou haſt made me no ſatisfaction thoſe do not qualifie the former words, Thou art a Thief, and haſt ſtoln a bundle of Fitches, adjudged actionable: Juſtice Jones was of the ſame opinion, for ſtealing of his Corn ſhall be intended of Corn ſevered, for otherwiſe it is acres of Corn, or Corn growing. Lord Hobart was of opinion, that the words ſhall be intended in mitiori ſenſu: And we all agreed, that that which qualifies or extenuates words ought to be full and not ambiguous.

Case. Words. Pophams Rep. fo. 211.

1 Bulſtr. 73. acc. Hob. 184. 331.

Rud *verſus* the Biſhop of Lincoln.

Quare Impedit. IN a Quare impedit **brought by** Edward Rud **againſt the Biſhop of** Lincoln **Lord keeper**, Drury and Stubbin, **for the Church of** Dackworth, **upon Evidence at Bar, theſe Points were reſolved in the Court.**

Quare Impedit. 1. When one uſurps upon a Leaſe for years, that this Uſurpation gains the Fee, and puts the very Patron out of poſſeſſion, And though
Per reverſion. by the Statute of **Weſtminſter 2. cap.** 5, he in reverſion after the Leaſe may have a **Quare Impedit** when the Church is void, or may preſent, and if he preſent, and his Clerk be admitted and inducted, that then he
Uſurpation gains a Fee. is remitted, yet untill it be recovered, or his Clerk be in, the Uſurper hath the Fee and againſt him lies the Writ of Right, and that deſcends to his Heirs, and his Wife ſhall be endowed.

Patronage recovered by one who has no title. 2. When the King preſent one by Laps, not having any Title of Laps, and a recovery is had againſt him in a **Quare Impedit** by one which had no Title: If this gain the Patronage; And it is clear the King had no Title to preſent; and although he which comes in by ſuch Laps, is not Incumbent, nor gains the Patronage, yet he is Incumbent as to all Eccleſiaſtical matters, to have Offerings, Tithes, &c. for it is only as to the rightfull Patronage, no gaining of the Patronage, but he may preſent, **vide Gæns caſe, Coke lib. 6. fol 29.**

Inſtitution and Induction without a Writ by the Biſhop. 3. It was reſolved by the Court, that when one recover in a **Quare Impedit**, although that no Writ be awarded to the Biſhop, yet if upon non preſentment the Biſhop will admit and inſtitute his Clerk and he is Indicted: And that is good, as well as a man may enter without a Writ of **Habere facias ſeiſinam** after recovery; ſo may the Patron which hath recovered in a **Quare Impedit** preſent, and that being accepted, and Inſtitution and Induction purſuing thereupon, it is a good.

4. Alſo, where the Iſſue was, whether the Church was void at the time of the preſentment of **Pain** or not; and it appears that the caſe was that **Thomas Rud** after the Church was void by the death of **Clement Rud**, and after that one **Tarall** was preſented by Laps and Admitted, inſtituted, and Inducted where the King had not Title, the ſaid **Thomas Rud** having good Title to preſent, made a writing of preſentation of the ſaid **Pain**, and after (be it then exhibited to the Biſhop, or no) The ſaid **Thomas Rud** brought
Preſentation Exhibited to the Biſhop. a **Quare Impedit**, and recovered, and afterwards this Preſentation is exhibited to the Biſhop, and he admit, inſtitute, and makes a Mandate for Induction, which alſo is afterward done accordingly. Now the Iſſue being, whether the Church was void at the time of the Preſentation of **Pain**, the time of this Preſentation ſhall now be the time of exhibiting thereof after the Judgment:
Church when void. And then as to **Rud** which had recovered againſt him, the Church was then void, for whenſoever the Biſhop had the Preſentation exhibited, at that time he ought by the Law to admit, inſtitute, and give a Mandate for Induction, the then Church is void: But after the Judgment the Biſhop ought to accept that, and admit and inſtitute. **Ergo** at that time the Church was void, and that is to be the time of the Preſentation.

5. When

5. When one having good Title to preſent, and an Incumbent by Uſurpation is admitted, inſtituted, and inducted, and after that the Patron preſent, and the Biſhop refuſe, and after the Patron recover, and then he which had this preſentation exhibite it to the Biſhop, this is now a good Preſentation, and the Patron cannot revoke or give him a new Preſentation, but if the Patron before the death of the Incumbent makes Letters of Preſentation, that is is void, becauſe he had no Title to preſent. Preſentative before recovery. Before the death of an Incumbent.

Hil. 20 Jac. Rot. 1942.

Pleydell *verſus* Goſmoore.

Wilts.

HEdmond Pleydell brought an action of Treſpaſſe againſt Richard Goſmoore, and William G. for the taking and chaſing of a Colt and fettering of him, with a Continuando as to the fettering. Treſpaſſe. Where one may fetter an Eſtray.

The Defendant conveys the Mannor of Sharſton to Francis Earl of Hertford: And that the Earl, and all thoſe whoſe Eſtates, &c. had the Eſtrayes which come within the ſaid Mannor, and that the Tithingmen for the time being, ſeiſed the Eſtrayes and proclaimed them at the next Market or Fair, &c. and kept them till they be claimed or forfeited: And that he was a Tithing-man, and ſeiſed this Colt as an Eſtray; and becauſe this Colt was ſo fierce, &c. that he could not be kept in Paſture, he fettered him, and kept him in his Paſture within the Mannor, and that for the ſpace of two weeks, and the Plaintiff having notice claimed him, and had him delivered, &c. The Plaintiff demurred generally.

Atho ſaid, that he had not averred that he continued fierce, &c. but at the time of taking was ſo: To this it was anſwered, That the Count chargeth not the Defendant abſolutely with all the time, but Diverſis diebus & vicibus: And alſo he juſtifie for two weeks, which is the ſame Treſpaſſe: Then upon the matter the queſtion is, if he which hath Eſtrayes or Waifes, if he ſeiſe an Eſtray qui eſt ferox, whether he may fetter ſuch Eſtray.

It was agreed by the Court, that when an Eſtray comes within a Mannor and walk there, this is a Treſpaſſe, and the party in whoſe Land the Eſtray is Damage-feaſant, may chaſe him out of his ground. Chaſing of an Eſtray.

Alſo it was agreed, that untill the Lord, or his Bayliff, or Tithingman ſeiſe the Eſtray, that ſhall not be ſaid an Eſtray; but when the Lord ſeiſe, then he hath the Commencement of a property thereby, and he is chargeable againſt all others for the Treſpaſſe which this Eſtray doth; and if this Eſtray within the year Eſtray out of the Mannor, the Lord may chaſe back the Eſtray, untill he be ſeiſed by another Lord which hath Eſtrays: But if he be ſeiſed by another Lord, then the firſt hath loſt all his poſſibility of gaining the property, and the other Lord ought to proclaim it de novo. Property in an Eſtray. When it accrues. Alters.

It was moved, that if a Lord of a Mannor which hath Eſtrayes, and hath ſeiſed an Eſtray, ſuffer that Eſtray by negligent keeping to ſtray away, and never can be found again, the Owner may have an action upon the caſe of Trover and Converſion againſt the Lord, Quære vide An Eſtray loſt. Action againſt the Lord.

44 E. 14. there the Lord seised an Asse for an Estray, he to whom the property did belong came and challenged the Estray, the Lord may detain him untill he tender sufficient recompence for the Pasture, vide pur ceo 20 H. 7. 1. by Vavisor, and 39 E. 3. 3. That the Owner cannot take an Estray untill he tender recompence; likewise the Lord after seisin of the Estray, if he took him not Damage-feasant, may have Replevin, and he ought to make him amends.

Detaine till recompence tendred.

Lord brings Replevin.

The Lord cannot work the Estray, but may keep him in his Stable: And if the Sheriff upon a Fieri facias fetter the Colt, and after the Defendant redeem him for money, he shall not have trespasse, vide 6 E. 3. 8. it is not alledged that the fettering was to any damage of the Estray, vide 22 Ass. 56.

Working an Estray.

Entred Pasch. 18 Jac. Rot. 650.

Treherne *versus* Cleybrooke.

Debt.

IOhn Treherne brought an action of Debt against Cleybrooke, and count of a Lease made by John Treherne Grand-father to the Plaintiff, of Lands in S. Olives in Surrey, and intituled himself by the Will of the Grand-father, by which he devised the Lands to the Plaintiff in tail, the remainder over to Leonard. Upon Nil debet pleaded, the Jury found specially, scilicet, the Devise of the Reversion in tail, the remainder over to A. in tail, the remainder of one Moyety of the Land to one Daughter in tail, and the other Moyety to another, with Proviso, that for the raising of a Stock for John Treherne the Grand-child, when he come to the age of one and twenty years, or if he dies, for the raising of a Stock for Leonard in like manner, he willed that Edward Griffin and Anne his Wife shall take the profits, and shall receive all the rent of the Land devised to John Treherne, to their own use, untill he come to the age of one and twenty years, upon Condition, and so as the said Edward Griffin and Anne shall within three months after the death of the Testator become bound to his Overseers in an Obligation, with such penalty as the said Overseers shall think fit to pay to the said John, or if he dye without Issue to the said Leonard, within three months after he come of age, such a summ, the Condition to be drawn and devised by his Overseers: And if Edward Griffin and his Wife refuse, then the Overseers should receive the Rent and Profits to their proper use: (But the Condition appoint not to whom the Overseers shall be bound.) And made Edward Griffin and William Iremonger his Executors, and I. and others Supervisors, and died; and that within fourteen daies after the death of the Testator, the Will was read to the said Overseers, And that they did not devise or draw (within the time appointed) any Obligation, nor tendred any within that time, and that notice thereof was given to the Defendant, and that the Rent was demanded, and the Reversion claimed by the Plaintiff, sed utrùm, &c.

Devise.

On Condition.

To give bond.

Not saying to whom.

Executors, Coadjutors.

Wentw. Executors 16.

Upon the Argument of Serjeant Harris who argued for the Plaintiff, and vouched 21 H. 6. 6. That when one made Executors, and also Coadjutors, the Coadjutors are not Executors, and that it is a Condition precedent, vide 14 H. 8. 22. Wheelers case 46 E. 3. 5. Truels case, Coke

Coke lib. 5. 127. Palmers caſe, 4 E. 3. 39. 11 H. 4. 18. And becauſe that in this caſe the ſaid Edward Griffin and his Wife are to have benefit, they ought to require them to nominate the ſum: But becauſe it appears to the Court that this Action is founded upon a Contract in Law, therefore it ought to be brought in Surrey; as it was agreed in Ungle and Glovers caſe, An. 36 Eliz. vide Coke lib. 3. fol. 23. Nota, that the Judgment is ſpecial for this cauſe, and no coſts upon the Statute of 23 *H.* 8. for the Defendant, for the Statute ſays, that upon a Contract made by the Plaintiff, the Defendant ſhall have coſts, and yet upon this Statute if the Executor be non-ſuited, or Verdict given againſt him, he ſhall not pay coſts, by common experiente alwaies after the Statute; and yet he ſhall have coſts if he recover. And in this caſe the Plaintiff ſhall have coſts if he recover, and yet it ſeems upon this Judgment the Defendant ſhall not have coſts againſt him, and eſpecially becauſe that they are expreſs words in the Statute, that the Defendant ſhall have coſts after Nonſuit, or lawful trial againſt the Plaintiff, and here is neither Nonſuit nor lawful Trial, vide Statute 4 Jac. cap. 3. ſeems to be full in all caſes where the Plaintiff ſhall have his coſts upon Nonſuit, or when the Verdict paſs againſt him, the Defendant ſhall have coſts, yet it hath been taken, that it ſhall be intended in actions of Debt upon the Contract of the Plaintiff himſelf, for Executors neither upon Verdict nor upon Nonſuit ſhall pay any coſts, becauſe that their actions are brought upon Debts or Contracts, not made between them and the Defendants, vide the Statute of Glouceſter cap. 1. that where a man recovers damages, there alſo he ſhall have coſts.

Who to do the firſt act.

Actions local.

Where coſts ſhall not be againſt Executors. 2 Bulſtr. 261. Vapres 78, 79. Stat. 4 Jac. 3.

Hickſon *verſus* Hickſon.

Hickſon Demandant in Dower againſt Hickſon; They are at iſſue, the Tenant offer to be eſſoined upon the Venire facias, and for want of the Adjournment thereof by the Demandant, the Tenant had procured a Nonſuit, and yet the Demandant proceeds with the Iſſue. And at the Niſi prius the Tenant relying upon the Nonſuit, it appeared not by whom the Petit Cape is awarded.

Eſſoin ſhall not be allowed in Dower.

And now upon motion by Serjeant Henden, who relied upon the Nonſuit, and that the Eſſoin was allowable by the Statute of Weſtminſter 2 poſt exitum habeat unicam Eſſoniam: but it was ruled, and the Prothonotaries all ſaid that it had been the conſtant uſe, that no Eſſoins are allowed in Dower, which is Feſtinum remedium, vide Stat. 12 E. 2. cap. 1. hath tolled the Eſſoin of the Service of the King in many caſes, and given to the Demandant in many caſes power ad calumpniand. Eſſoniam: And the words of the Statute are, Non jacet in breve de dote, quia videtur deceptio & prorogatio juris, vide Dyer 324. There after the Iſſue joyned, Eſſoin at the day of the Venire facias, though no Venire facias be ſued out, but only awarded upon the Roll.

Mich. 21 Jac.

Linleys Caſe.

An Information againſt an Under-Sheriff, for taking of 30 s. for making of a Warrant upon a *Capias ad ſatisfaciendum.* Stat. 23 H. 6. 10.

AN Information was exhibited againſt Linley Under Sheriff, to Sir Guy Palmes Sheriff of York, upon the Statute 23 H. 6. and it was ſhewn, that he being Under Sheriff, a Capias ad ſatisfaciendum was delivered to him, to Arreſt one Francis Lancaſter upon a Judgment for a hundred and three pounds: The Defendant Colore officii took of the Plaintiff thirty ſhillings for making of a Warrant upon this Writ, againſt the form of the Statute, whereby he hath forfeited forty pounds.

Upon Not guilty pleaded, and Verdict againſt the Defendant, it was alledged in arreſt of Judgment, that the making of a Warrant upon a Capias ad ſatisfaciendum, which is for Execution, is not within the Statute, becauſe the Statute ſpeaks firſt, of Fees to be taken upon the Arreſt of the party, when he is bailed, viz. twenty pence to the Sheriff, and four pence to the Baily, then appoints that the Sheriff lets to Bail every one that is taken upon Bill or Plaint, beſides them which are taken for Execution, Outlawry, &c. and then comes the clauſe, That nothing ſhall be taken for making of any Præcept, or Warrant, but four pence; and proviſion for the Obligation, Condition, and Fee, and that all Obligations taken by any Sheriff Colore officii, that theſe ſhall be void, and that for every offence committed againſt the Statute, he ſhall forfeit forty pounds.

The Lord Hobart inclined, that this making of the Warrant upon the Capias ad ſatisfaciendum, and the taking of thirty ſhillings is within this Statute; and he reſembled it to Dive and Maninghams caſe in Plowden, where an Obligation taken of one in Execution is void by this Statute: vide, that the clauſe in this Statute for the Obligation is abſolute, without any reſtraint, but that all Obligations taken by colour of his Office, with any other Conditions are made void.

Extortion *per* Sheriff.

This taking of thirty ſhillings for making of a Warrant upon a Capias ad ſatisfaciendum is extortion at the Common Law, for which he may be indicted, but whether it be within this Statute or no, is doubtful.

Another Exception was taken to this Information; That it doth not appear by this, that this Writ of Capias was directed to the Sheriff of York, or to any other Sheriff: And then admitting this to be a Capias ad ſatisfaciendum directed to the Sheriff of Lincoln, and it is delivered by an ignorant hand to the Sheriff of York, to make a Præcept thereupon, and he makes a Præcept, and takes thirty ſhillings, this is not within the Statute; alſo Colore officii will not ſerve, for it is general, and it ought to be ſhewn that it was a Capias, and to whom it was directed: And although that all Proceſs ſhould be generally directed to the Sheriff, yet ſome may be to the Coroners, or ſome (by the miſpriſion of the Clerks) may be omitted; as Jacobus Dei gratia &c. tibi præcipimus, and ſay not, Vice-Comiti Eboracenſi ſalutem. And an Information ought to be certain to all common intents, and it is like to an Indictment. And in an action upon the Caſe againſt an Attorney, becauſe that he Corruptive and in deceit of the Plaintiff, and

Indictment too general.

in

in his name had acknowledged ſatisfaction to his damage, and ſays not, whereas Revera non fuit ſatisfactus, that is not good.

And the Court was of opinion for this cauſe, that the Plaintiff ſhould not have his Judgment.

Bickner *verſus* Wright.

Caſe. For making Cony-boroughs in a Common. Preſcription for Common helps.

AN action upon the caſe was brought by Richard Bickner againſt John Wright, for the making of a Cony-borough in damage of his Common; The Plaintiff preſcribe to have Common omni tempore anni, and ſays not, Quolibet anno: And after Verdict adjudged good.

Trin. 22 Jac.

Goldenham *verſus* Some.

Dower. Judgment in Dower upon Voucher after the Vouchees death.

GOddenham brought a Writ of Dower againſt John Some, who vouched the Heir of the Husband, who entred into the Warranty, and ſaid that he had no Aſſets: The Demandant had Judgment for her Dower (becauſe nothing is ſaid to the contrary) againſt the Tenant, with a Ceſſet executio, until the Warranty be determined: And the Tenant which vouched, when the Trial was at Aſſiſes, made default, but it was ſaid that it ſhould be the default of the Vouchee, for he was dead before the Aſſiſes. And now it was moved that the Demandant might have execution. And by Henden it was ſaid, that the Voucher is not determined, for he might vouch the Heir of the Vouchee: But it ſeemed that the Voucher was determined, and that he ſhall have the benefit of his Warranty (by Scire facias) out of the Judgment; but the Court doubted if the Plaintiff ſhall have Judgment againſt the Vouchee conditionally (if he had Aſſets, if not, againſt the Tenant) or abſolutely, vide 3 H. 6. 17. Dyer 202. there it is conditional, vide Dyer 256. there the Judgment is againſt the Tenant upon Vouchee of the Heir in Ward to the King, and that preſently, with a Ceſſet executio, vide 46 E. 3. 25. If the Vouchee be Counterpleaded, the Demandant ſhall have Judgment preſently, vide 48 E. 3. 5. Br. Voucher 38. the Judgment ſhall be againſt the Heir conditionally, which is vouched in Dower, vide 2 H. 4. 8. there upon the Voucher of the Heir which makes default upon the Summons, & ſequatur ſub ſuo periculo, the Judgment is againſt the Heir conditionally, if not againſt the Tenant, and ſo Judgment againſt one not party to the Suit, and which never appeared: And in this caſe the Judgment againſt the Tenant, with a Ceſſet executio may be good, becauſe that it doth not appear by any of their Pleas, but that the Demandant is confeſſed to have her Dower, none of them ſay, that he is ready to render her Dower (as the Heir ought when he enter into the Warranty.)

Judgments with *Ceſſet Executio.*

This Term Serjeant Finch moved the caſe, and prayed Judgment, for he ſaid, the ancient Books were many for Judgment conditionally; but ſome to the contrary, viz. when the Heir is vouched within the ſame County, and is within age, there Judgment preſently againſt the

the Tenant, with a Ceſſet executio: And when the Heir enter into the Warranty, and is taken to render the Dower, there is Judgment againſt the Heir, and that the Tenant ſhall hold in peace: But he ſaid that Mich. 38, & 39 Eliz. Rot. 1208. Mary Aſhburnham brought Dower againſt Skinner, who vouched the Heir of the Husband in the ſame County, who preſently entred en le garranty, and ſaid, that he had no Aſſets, there the Judgment was given preſently againſt the Tenant, with a Ceſſet executio: And after the Iſſue was tried, and found that the Heir had not Aſſets, and the Wife had Execution, but it was ſaid, that Error was brought thereupon, yet the Feme continued the Poſſeſſion.

Aſhburnham againſt Skinner.

Henden ſaid, that the Tenant otherwiſe ſhall loſe the benefit of his Warranty, vide 13 H. 4. Judgment 241.

The Court adjudged this caſe for the Demandant, upon view of the ſaid Preſident of 38 & 39 Eliz. And as this caſe is, the Demandant upon neceſſity ought to have Execution, becauſe that the Tenant which ought to have the benefit of the Warranty made default: And if it was ſo that the Vouchee was dead, the Tenant ſhall not have any other Voucher, for the Dower ought not to ſuffer delay: And likewiſe when Judgment is given againſt the Tenant, with a Ceſſet executio, all is one, as a conditional Judgment againſt the Tenant, for if Aſſets be found, then Quia compertum eſt, &c. with Judgment againſt the Heir, and that the Tenant ſhall hold in peace.

It was objected, that Judgment ought to be conditionally at firſt, and not to give one Judgment againſt the Tenant, and afterwards if Aſſets be found, another Judgment againſt the Heir; but that is no inconvenience. Some ſay, that when ſuch Judgment is given againſt the Tenant, with a Ceſſet executio, there if Aſſets be found, the Demandant ſhall not have execution againſt the Heir, but againſt the Tenant, and he ſhall have ad valentiam. Quære.

Potter *verſus* Brown.

Caſe. Words. Theft. Averment.

Nicholas Potter brought an action upon the Caſe againſt Brown for theſe words ſpoken of the Plaintiff, He is as arrant a Thief as any is in England, and he broke up the Plummers Cheſt with other mens Tools which ſtood in my Lord of Suffolks houſe, and took Money out of it. The Defendant pleaded Not guilty, and Verdict for the Plaintiff: And upon the motion of Henden to Arreſt, and Richardſon to have Judgment; The Court reſolved, that the Plaintiff ſhould not have Judgment. The firſt reaſon is, becauſe that there is not any affirmative directly, that he is a Thief; but as arrant a Thief as any is in England, And avers not, that there is any Thief in England: And the Law will not preſume any thing that is evil, Iniquum in lege non preſumitur. And as Lacies caſe was, He is as great a Thief as any is in Warwick Goal; He ought to aver, that there was a Thief there at the time of the ſpeaking of the words: And it is the ſame reaſon in this caſe.

Then the latter words are ambiguous, and admit of a double interpretation, and the better ſhall be taken.

Querens nil capiat per breve.

Mich.

Mich. 22 Jac.

Methell *verſus* Peck.

Methell brought an action upon the Caſe againſt Peck, and count, that the Defendant in conſideration that the Plaintiff had paid to one Playford forty pounds, to the uſe of the Defendant, and by his appointment he aſſured upon requeſt to deliver an Obligation, in which he and another ſhould be obliged to the Plaintiff in a hundred pounds. And that the Defendant Licet ſæpius poſtea requiſitus, did not deliver the ſaid Obligation; upon Non aſſumpſit pleaded, Verdict for the Plaintiff: And it was moved in Arreſt of Judgment by Hitcham, that the Plaintiff had not alledged any ſufficient requeſt, by ſhewing ſuch a day, and ſuch a place, which is iſſuable: And being collaterall matter, the requeſt is part of the ſubſtance of the action; But where it is upon Debt or Contract, and not ſevered from the duty, then a Licet ſæpius requiſitus is ſufficient. Caſe. Where the requeſt of a collateral thing ſhall be alledged.

But the Court were of opinion that the Plaintiff ſhall have Judgment; and yet they agreed the diverſity, when a requeſt ſhall be alledged as part of the thing to be performed, and when it is but implyed in the Debt: For when it is collaterall, there it ought to be alledged, and for the time it is ſufficient, viz. poſtea, but the place of the requeſt is omitted: And if Iſſue had been tendred thereupon, it might be ſupplyed afterwards where it ſhall be tryed, where the action was brought; And Non aſſumpſit allowes the requeſt; as if the Defendant had pleaded concord and ſatisfaction, the Requeſt is not to be proved in Evidence, vide 10 H. 7. 16. Apres 106. 1 Croke. 139. 386.

But it is ſaid, that this Judgment was reverſed in the Kings Bench, becauſe that the Requeſt being upon Collaterall matter, which was the cauſe of the Action, it is material. V. Popham 60. V. 3 Bulſtrode 295. 200.

Mich. 22 Jac.

Ejectionæ firmæ.

IN Ejectione firmæ brought, and counted upon a Leaſe at Hayleſam, of Tenements there: The Defendant pleads, that Hayleſam, ubi tenementa prædicta jacent, is within the Cinque-Ports, Ubi breve Domini Regis non currit, and plead to the Juriſdiction. The Plaintiff reply, that the Tenements are in the County of Lancaſter, abſque hoc, that the Town of Hayleſam is within the Cinque-Ports, whereupon the Defendant demur, and adjudged no cauſe of demurrer. For Hayleſam is all Hayleſam, and the Court will not intend any Fractions in the Town, viz. that part ſhall be in the Cinque-Ports, and part without (as it was affirmed the truth was) but that ought to come upon the ſhewing of the Defendant in his Bar, vide 50 E. 3. 5. Sir William Ellinghams caſe.

Town ſhall be intended all the Town.

Defend. reſpond. ouſt.

THE

THE FIRST YEAR OF

KING CHARLES.

Termino Paſch.

Hitcham *verſus* Brook.

SIr Robert Hitcham Serjeant at Law, and to the King, brought an action upon the caſe againſt one Brook, a Juſtice of the Peace, and which had been Sheriff of Suffolk; and count, that he for divers years laſt paſt, had been one of the Kings Serjeants, and had demeaned himſelf well and loyally in the diſcharge of his duty, and had gained good opinion, and had acquired by his practice a good Eſtate for the maintenance of him and his Family; The Defendant ſaid, I doubt not but to prove that the Plaintiff hath ſpoken Treaſon (*Innuendo* Treaſon againſt the King:) Verdict was found for the Plaintiff; And it was moved in Arreſt of Judgment, that theſe words are not actionable. Caſe *per* Serjeant at Law. Words Treaſonable.

Firſt, becauſe no time is alledged when the Plaintiff is ſuppoſed to ſpeak Treaſon, and it might be when he was an Infant, or that it is pardoned: To which it was anſwered by the Court; Firſt, That theſe words ought to be alledged as they were ſpoken, and that was Indefinite. 2. The time is not material, unleſs the Defendant make it material by his plea, viz. When he was in giving Evidence for the King againſt a Traytor, and then he repeated ſuch words; or when that the Plaintiff was frantick, and of that he intended, and ſo juſtifie, there the time may come in queſtion. When ſpoken.

2. The ſecond Exception was, that there is not any expreſs affirmative: To that it was anſwered by the Court, that it was more then an Affirmative, for he had (as he ſaid) paſt thereof, and not a report or hearſay: And if one ſay, it is reported, &c. that will not bear action, unleſs he juſtifie the report, by charging it upon him which was the Author of the report. Affirmation. Report.

3. Alſo it was objected, That the ſpeaking of Treaſon was not Treaſon; But it is holden clearly, that it is as well as preaching or writing, Et Index animi Sermo. Treaſon by words.

4. Alſo it is not ſaid what Treaſon, and it may be high or petit Treaſon,

ſon: To which it was anſwered, that when he ſpeaks generally of treaſon, it ſhall be intended according to the common intendment, which is treaſon againſt the King, vide Sir William Mulgraves caſe, Coke lib. 4. And two Caſes were vouched to be adjudged in the Point, one between Johnſon and Atewood, 8 Eliz. Thou haſt ſpoken Treaſon, and I will hang thee for it, adjudged actionable. The other was between Pewall and Vardoſſe, 9 Jac. Thou haſt ſpoken treaſon, and I will prove it, adjudged actionable.

Johnſon and *Atwood.*

Pewall and *Vardoſſe,*

And it was reſolved by all that the Plaintiff ſhould have his Judgment.

Flight *verſus* Greſh.

Caſe. 1 Croke 8. Aſſumpſit.

In conſideration that the Obligor pay the ſumm, the Obligee aſſume to deliver the Bill. Vaſpes 101.

THomas Flight brought an action upon the caſe againſt Greſh; and count, that whereas the Plaintiff and one Baleman were bound in an Obligation to the Defendant, for the payment of ſuch a ſumm at ſuch a day; The Defendant in conſideration that the Plaintiff would pay to him the ſaid ſumm at the day, aſſumed to deliver the Obligation to the Plaintiff, and ſhewed that he had paid the money at the day, and the Defendant did not deliver it, but after ſued it and recovered, and had the Plaintiff in priſon in execution by the ſpace of a year.

The Defendant proteſtando, that he did not aſſume, for plea ſaith, that the Plaintiff did not pay; and thereupon Iſſue, and found for the Plaintiff. And it was moved by Serjeant Gwin, that this action lies not for want of conſideration, for the Plaintiff did nothing but that which he was obliged to do, and no profit to the Defendant, for if he had not paid the ſum, the Obligation had been forfeited: And he reſembled it to the caſe of 9 E. 4. 19. An accord (in Treſpaſſe) that the Defendant ſhould deliver to the Plaintiff his Evidences, and permit him to enter into his Land, is no good Bar: So in an Arbitrement, 12 H. 7. that the one permit the other which was diſſeiſed to enter, and that he ſhould give to him his Charters and Evidences, is not good: And he vouched one to be reſolved in the Kings Bench, between Greenwood and Becket, where one had forfeited three Bills, in conſideration that the Plaintiff will pay the three ſeverall ſumms three daies after, he would deliver them to the Plaintiff: And the Court was of opinion that it was no ſufficient conſideration.

Conſiderations.

Greenwood and *Becket.*

Richardſon to the contrary, and ſaid that the payment without ſuit, was for the advantage of the Obligee, to be ſure of his money, and may be more available to him at this time, then the forfeiture afterwards: And he vouched a Caſe to be adjudged, that where one had bought Cattle in a Market, and had paid for them, and the party which had bought them (becauſe that he which ſold them had them in poſſeſſion, and would not deliver them) in conſideration that the party would deliver them, promiſed to pay him a certain ſumm, an action lies thereupon.

And the opinion of the Court was, that the action lay, for (for any thing that appears) the monies were paid before the time that in Law they might be paid, viz. before the ſetting of the Sun: And it is without queſtion, if a man to whom money is to be paid, come to the party the ſame day, and pray him to pay it in the morning, and that in conſi-

deration

derations thereof, promiſe to pay him five pounds to abate five pounds, or to deliver an Obligation, this is good: And a voluntary promiſe to do that which is in good conſcience good and juſt for him to do, ſhall bind him, and the rather becauſe he had benefit, viz. to be ſure of the performance: And the forfeiture is but means to obtain the principall ſumm: And if one had Judgment, and in conſideration that he will not ſue execution, the other promiſe to pay, it is good: And becauſe that in this caſe it appears, that by the non-performance of this promiſe the Plaintiff had prejudice, and the Jury had found ſolvit, the Plaintiff had Judgment.

Hil. 21 Jac. Rot. 3150.

Trevors *verſus* Michelborne.

EDmond Trevors brought a Scire facias againſt Michelborne Sheriff of Surrey, for the returning of inſufficient Pledges in a Replevin brought by one Ray againſt the now Plaintiff, in which the ſaid Richard Ray made default, whereupon a Retorn. habend. was awarded, an Averia elongata returned, and then a Withernam, and then a Nichil &c. And for this taking of inſufficient Pledges, this Scire facias is brought, upon Weſtminſter 2. cap. 2. And the Defendant demurred, vide the like Preſident, Hil. 11 Jac. Rot. 3563. between Somerford and Beamont.

Sci. fac.

Sci. fac. againſt the Sheriff for taking of inſufficient Pledges. Weſtm. 2. Cap. 2.

Somerford and *Beamont.*

Hil. 1 Car.

Uvedall *verſus* Tindall.

Enter Hil. 21 Jac. Rot. 705.

Southamp.

SIr Richard Uvedall brought an action of Treſpaſſe againſt William Tindall Clark, Vicar of Alton, and John Doveland for taking bona & Cattalla, and count for the taking of two Carectat. glaſti, Anglice Woad: And upon Not guilty pleaded, the Jury gave this ſpeciall Verdict; Viz. For the Moyety of a Load of Woad, Si videbitur Curiæ quod decimæ glaſti ne ſunt minutæ decimæ, then the Defendants not guilty, but ſi ſunt minutæ decimæ, then they are guilty.

Treſpaſſe. 1 Croke 8. What things are ſmall tithes and what great.

And this caſe was argued at Bar by Serjeant Bridgeman, and Serjeant Henden: And the Court unement agreed, that for ought that here appears, this Verdict being found without any circumſtance, that this Woad ſhall be taken to be Minutæ decimæ. Title-woad

It was agreed by Henden, that if it had been found Woad growing in a Garden, then minutæ decimæ.

And it was agreed by the Court, that it might have been ſo found, that it ſhould be Majores decimæ, and prædial; as if all the Profits of the Parſonage conſiſt of ſuch Tithes. And ſo of other things, which in their own nature are minutæ, may become majores, if all the profit of the Parish conſiſt therein: As in ſome Countries, a great part of the Land within the Pariſh is Hemp, or Lime, or Hops, there they are great Tithes; and ſo it may be of Wooll and Lambs.

Hemp. Lime. Hops.

Peddingfields Caſe.

Paſch. 3 Jac. in the Kings Bench, Beddingfeilds caſe, Farmer to the Dean and Chapter of Norwich, who had the Parſonage Impropriate, and had uſed to have Tithes of Grain and Hay, and the Vicar had the ſmall Tithes: And a Feild was planted with Saffron, which contain forty acres: And it was adjudged that the Tithes thereof belong to the Vicar.

Saffron.

Potmans caſe. Hops.

There was a Caſe in this Court as it was vouched by Henden, 3 Jac. between Potman a Knight, and another: And the queſtion was for Hops in Kent; and adjudged that they were great Tithes; but as for Hops in Orchards or Gardens, theſe were reſolved to belong to the Vicar as Minutæ decimæ.

There was a Caſe in this Court for tithe of Weild, which is uſed for Dying, and that was in Kent, and it was ſown with the Corn, and after the Corn is reaped the next year without any other manurance, the ſaid Land brings forth and produce Weild: And that was a ſpeciall Verdict, whether the Vicar ſhall have the tithe of it, or the Parſon, but one of the parties died before any Judgment. And if Tobacco be planted here, yet the tithes thereof are Minutæ decimæ: And alſo theſe new things, viz. Saffron, Hops, Woad, &c. if it doth not appear by material circumſtances to the contrary, ſhall be taken as Minutæ decimæ: And ſo this caſe was adjudged for the Defendant.

Weild.

Tobacco.

Hil. 1 Car.

Townley *verſus* Steele.

1 Croke. 29.

In Raviſhment of Ward brought by Executors, are Non-ſuited, whether they ſhall pay coſts.

FRancis Townley, and three others, the Executors of William Peacock, brought a Writ of Raviſhment of Ward againſt Richard Steele and Anne his Wife, for the Raviſhment of the body of Ralph Smith Coſin and Heir of Ralph Smith; and count of the Tenure by Knights-ſervice in Ralp Smith of William Peacock, and that Ralph Smith died, the ſaid Ralph his Coſin and Heir being within age; and that William Peacock the Teſtator ſeiſed of the body, and died poſſeſſed thereof, and made them his Executors, and they being poſſeſſed of the ſaid Ward, the Marriage of whom belong to them, the Defendants Rapuere illum & abduxere: And upon Not guilty pleaded, the Jury was at Bar, and the Plaintiffs after Evidence were Nonſuited.

23 H. 8. 15. 4. Jac. 3.

And whether the Defendants ſhall have coſts in this caſe was the queſtion, upon the Statute of 23 H. 8. cap. 15. or by the Statute of 4 Jac. cap. 3. And it being argued by Davenport and Atho, the Court this Term (the chief Juſtice being abſent) gave their opinions.

And Juſtice Crook argued that they ſhould not have coſts, and put many caſes, when Executors bring actions, they ſhall not pay coſts, and

ſo

ſo is Common Experience (after the Statute) which is the beſt Interpreter of the Law: And if it ſhould be otherwiſe, Executors would be diſcouraged to bring actions for the debts of their Teſtator.

And Juſtice Harvy was of the ſame opinion, but Juſtice Yelverton and Hutton to the contrary: And they agreed, that in all actions brought by Executors, upon Contracts, Obligations, or other things made to the Teſtator, there ſhall be no coſts, for that is not within the Statute, viz. Contracts, or Specialties made to the Plaintiff; or if an action be De bonis aſportatis in the life of the Teſtator, or upon any Tort ſuppoſed to be done not immediately to the Plaintiff, there ſhall be no coſts, becauſe that the Statute gives not coſts in theſe caſes, 20 Mariæ, Debt upon a Demiſe for years, if the Plaintiff ſhall be Non-ſuited there ſhall be coſts, for it is upon Contract, though in ſome ſort reall. But in this caſe, though the Plaintiffs are named Executors, and their Title is derived from their Teſtator, yet the action is brought upon an immediate Tort done to themſelves; and it is within the very words of the Statute: and this Statute which is to prevent Veratious Suits, ſhall be taken favourably. V. devant 69. 1 Croke 219. acc.

If Executors have a Leaſe for years, and they demiſe it rendring rent, and for Rent arrear they bring an action, it ſhall be in the Debet and Detinet, and they ſhall pay coſts if they be Non-ſuited, and yet their Title is as Executors, but it is founded upon their own Contract, ſo if they bring an action of Treſpaſſe for the taking of Goods which came to their poſſeſſion, which Goods were in truth tortiouſly taken by the Teſtator, and he died poſſeſſed thereof, and they being Non-ſuited they ſhall pay coſts: And Executors in actions brought againſt them ſhall pay coſts, and if they have no Goods of the Teſtator, it ſhall be De bonis propriis. And vide, that upon Contracts made by them, or Rent arrear in their time, the action ſhall be in the Debet and Detinet; vide Coke lib. 5. Hargraves caſe. But when Debt is brought by Executors, and recovery had, and after a recovery an eſcape, and Debt upon this eſcape, this ſhall be in the Detinet only, according to the firſt cauſe of action. And this Raviſhment of Ward is an action within the Statute of 23 H. 3 and the Statute of Weſtminſter 2. gives no Damages, and therefore coſts by the Statute of Glouceſter cap. 1. and the Statute of 4 Jac. inlarge the actions, and not the perſons.

Hil. 1 Car.

Beverley *verſus* Power.

UPon an Aſſembly (this Term) of all the Juſtices at Serjeants Inne, by vertue of an Order of the Starchamber made the laſt Term, at reading, the Caſe was.

James Beverly was Plaintiff againſt Robert Power, and Warp Beverley, and others, which Bill was exhibited Hil. 16. Jac. and the Bill was for ſcandalous matter not examinable in this Court, and for other matter which was examinable, and Witneſſes examined and publiſhed: And then the 19. of Febr. 21 Jac. the generall Pardon is made by Parliament, by which all Offences, Contempts, and Miſdemeanors, Pardon.

del 20. Decemb. Before (except ſuch Offences, contempts, &c. whereof or for which any Suit or Bill within eight years before was exhibited into the Star-chamber, and there remaining to be proſecuted this laſt day of this preſent Parliament:) And afterwards, viz. Mich. 1 Caroli, the Cauſe came to hearing at the Suit of the Defendant, and upon the hearing Power was fined two hundred pounds; and for the abuſe and contempt to the Court for exhibiting the ſcandalous matter the Plaintiff was fined five hundred pounds, and for damage to the Defendant five hundred marks. And yet becauſe of the difficulty and diverſity of opinion which was between the Lord chief Juſtice, and the Lord Hobart, the now Lord Keeper and the Lords by an Order reſpited this matter, as to the Fine of the Plaintiff, and gave damages to the Defendant, and referred it to the opinion of all the Juſtices. And they all (una voce) except Juſtice Harvey (who inſiſted upon the damages given to the party, that they ſhould not be pardoned) agreed that the Contempt and Offence for the ſcandalous Bill exhibited, was pardoned, and not within the Exception; for it cannot be intended, that the Plaintiff exhibited a Bill, upon which he himſelf ſhould be fined, but this exception was of that which was laid to the charge of the Defendant, and the Defendant may have his remedy at Common Law, and the Contempt which is accidentall to the Offence is pardoned, and by conſequence the Fine.

Paſch. 2 Car.

Crane *verſus* Crampton.

Caſe. 1 Croke 34. ceſt caſe. Aſſumpſit. Notice.

CRane brought an action upon the caſe for aſſumpſit againſt Crampton, and count, that in conſideration of moneys paid, the Defendant did aſſume to give to the Plaintiff a Muff band at the day of his marriage: And he alledged in facto, that ſuch a day, and at ſuch a place he was married; and that the Defendant notwithſtanding that he was requeſted ſuch a day, and a year after the ſaid marriage, had not given to the Plaintiff the ſaid Muff; And upon Non aſſumpſit it was found for the Plaintiff, and moved in Arreſt of Judgment, that the Plaintiff had not alledged any notice given to the Defendant of his marriage.

Where to be given. Hob. 6. 8. 51. 1 Croke. 571. Marches Rep. 156.

And by the opinion of me and my two Brothers Harvey and Yelverton, Judgment was given for the Plaintiff; For the Defendant ought to take notice thereof at his perill, unleſſe he had provid to deliver the Muff after marriage, and after notice thereof, for if he ought to have notice (no place being agreed upon where it ſhall be given) then he ſhould be compelled to enquire and to find him, and give notice, and paradventure he could never give him notice; Alſo it is agreed, if one be obliged to pay to another twenty pounds, within three months after he come from Rome, there ſhall notice be given of his return, but the Obligor ought to take notice at his perill: And if it were with a Condition that I. S. (that is not party to the Obligation) ſhall do ſuch a thing, there ſhall not be notice. And this caſe of an Obligation is more ſtrong, for there is a penalty: and if it were to pay ten pounds when a Fair ſhall be at Dale, there he ought to take notice:

And

And they agreed the caſe of 8 E. 4. fol. An Obligation to perform an Arbitrement, there no notice is neceſſary, for it is the act of a third perſon: And if any notice be requiſite, the Requeſt imply it; as it was adjudged in the Kings Bench, between Hodges and Baldwin: But my Brother Crook ſeemed to be of a contrary opinion, for when the duty ariſe upon the notice, there notice ought to be. Judgment pro Querente.

Vid. Hob. 51. 1 Croke 133. Notice implied in requeſt. Verdict helps. *Hodges*, and *Baldwins* caſe. Verdict helps.

Laicon *verſus* Barnard.

Lincoln,

LAicon Plaintiff againſt Barnard one of the Attorneys of this Court, for Trover and Converſion of a hundred Sheep, the Defendant ſaid, that he brought Debt in the County Court of Lincoln, againſt one Hacliff, for two hundred and eighty pounds, upon an Obligation by Juſticies, and recovered, and that theſe Sheep were delivered to him in Execution, as the Sheep of the ſaid Hacliff: And that afterwards and before this action, the Plaintiff brought an action of Treſpaſs againſt the now Defendant for taking of theſe Sheep, Quare cepit & abduxit. And it was found for the Plaintiff, and Damages to two pence: And averred that they were the ſame Sheep; and the Plaintiff replied that the Damages found by the Jury, were only for the taking and chaſing, and not for the value: And that this Action was for another Treſpaſs, whereupon the Demandant demurred, and it was adjudged for the Plaintiff: for, for any thing that appears (which the Defendant hath confeſſed upon his Demurrer) it is not for the ſame Treſpaſs: Alſo the Damages of two pence cannot be given for the value of the Sheep. Alſo the Plaintiff when a Treſpaſs is done to him, may retake his Goods, and yet he ſhall have an action of Treſpaſs for the taking of them: And every taking, viz. (abduxit) import a chaſing; and no man will ſay, that by the recovery in Treſpaſs, when the Plaintiff had his Goods, that thereby the Defendant ſhall have the property: But it is true, that if the Plaintiff recover the value, thereby he wades the property, and by this way the Defendant ſhall have the property, vide 2 R. 3. 14. 4 *H.* 7. 5. 6 *H.* 7. 8. and Judgment for the Plaintiff. Yelverton at firſt hæſitavit, but afterwards agreed.

Caſe. 1 Croke 35.

Recovery in Treſpaſs for taking of goods, is no bar to an action upon the caſe *ſur Trover*.

Pro Party where altered by Recovery.

Paſch. 2 Car.

Wades Caſe.

AN action upon the Caſe was brought by a Feme, as Adminiſtratrix againſt the Lady Wade Executrix of Sir William Wade, Non aſſumpſit was pleaded. the Venire facis was well, but the Hab. Corp. Niſi pr. was entred, the Plaintiff, &c. and the Defendant Executrix of Sir H. Wade, &c. And it was amended by the Court, and there was the difference taken, that when the Niſi prius is ſo miſtaken, that if it ſhould be amended, the Jury ſhould be prejudiced, viz. that it may falſifie their Verdict, then it ſhall not be amended, but in this caſe, it is but the Writ by which the Jury is warned to appear: And the authority

Caſe.

Where the *Niſi prius* ſhall be amended, and where not.

rity of the Juſtice of Niſi prius is not by that, but by the Jurat, which was well and as it ought to be.

Alſo they have their Authority by the Statute of Weſtm. 2. vide Dyer 106. In Wootons Caſe, there the Jurat. was well, and omitted in the Niſi prius, Anthony Coke: Alſo the Iſſue was between Wooton and Cooke, and Temple, where Temple had confeſſed the action: vide there, that many omiſſions of the Record of Niſi prius, are to be amended. Brown was of the contrary opinion to Walſh, Weſton and Dyer.

Trin. 2 Car.

Farrington *verſus* Arrundell.

Entred Hil. 22 Jac. Rot. 4462.

Debt. 1 Croke 10.

A Action of Debt was brought by Lionell Farrington, Qui tam pro ſe quam pro Domino Rege, &c. againſt Thomas Arundell, upon the Statute of 23 Eliz. for not coming to Church; and the Defendant demurred upon the Count: And then King James died. And if this action be abated or not by the death of the King, was the Queſtion.

Debt upon a penal Statute is not gone by the death of the King. 1 E. 6 7. Actions *Tam quam.*

Vide the Statute of the 1 E. 6. cap. 7. vide Coke lib. 7. fol. 30 And concerning this was diverſity of opinion in the Common Bench; for my Brother Yelverton and I were of opinion, that the Debt is gone, for it is at the ſuit of the King, and Judgment is given for the King; and ſhall be anſwered to the King. And we relied upon the caſes vouched by the Lord Coke; but Juſtice Harvey and Crook to the contrary: And upon conference with all the Juſtices of Serjeants Inne, it was reſolved, that this action was at the ſuit of the party, for he might be Non-ſuited, vide 25 H. 8. Br. Non-ſuit, that the Informer may be Non-ſuited, vide 6 E. 2. Fitz. Non-ſuit 13. when the Jury come again to deliver their Verdict, the King cannot diſcharge them and be Non-ſuited, and the King cannot diſcharge this action. And his Attorney reply not as in an Information.

1 Inſt. 139. b. acc.

12 Rep. 29.

Clotworthy *verſus* Clotworthy.

Amendments.

Debt.

Simon Clotworthy brought an action of Debt againſt John C. Coſin and Heir of Bartholomew C. And the Imparlance Roll is, Quod cum prædictus B. cujus conſanguineus & hæres idem Johannes eſt, viz. filius Clotworthi fratris prædicti B. C. And upon the Plea Roll, upon which Judgment is given, this ſpace was perfected, and Judgment for the Plaintiff; and now the Defendant brought a Writ of Error, and it was moved to be amended: And if the Imparlance Roll ſhall be amended, which is the foundation of the ſubſequent Rolls, is the queſtion: For it is commonly holden, that the Plea Roll ſhall be amended by the Imparlance, but not e converſo.

1. Amendment. Imparlance Roll.

1 Croke 46.

Hil.

Hil.18 Jac.Rot.673.

Walker *verſus* Worſley.

Amendments.

WAlker brought an action of Debt againſt Worſley, as Son and Heir of Thomas W. in the Imparlance Roll which was entred, Mich. 18 Jac. Rot. 576. the words which bind the Heir were omitted, viz. Ad quam quidem ſolutionem obligaſſet ſe & Hæredes ſuos, but they were in a Plea Roll: And after Judgment that was aſſigned for Error in the Kings Bench, and it was amended in the Common Bench by the Court, vide there, that it was by the fault and miſpriſion of the Clerk, who had the Obligation, and ſo amendable by the Statute of 8 H.6.cap.15. 1.

Debt.

Amendments 2. in C.B. after Error in B. R.

8 H.6.15.

Hil.9 Jac.Rot.516.

Govard *verſus* Dennet.

GOvard againſt Dennet, and Judgment, and the name of the Attorney, viz. Henry was omitted in the Imparlance Roll Henry, and it was in the Plea Roll Henry, and after Error brought it was amended.

Amendm. 3.

Mich.16 Jac.Rot.581.

Arrowſmith's Caſe.

THe Imparlance Roll. Trin. 16 Jac. Rot. 1727. Debt for three hundred pounds againſt Arrowſmith, for part ſur emiſſet, and the other part ſur inſimul computaſſet: And in the Imparlance Roll, both parcels did not amount to three hundred pounds, but wanted ſix pounds thereof, and after Error brought it was amended.

Amendm. 4. Hob. 246.

Paſch. 12 Jac.Rot.420.

Godhow *verſus* Bennet.

REplevin by Godhow againſt Bennet, divers ſpaces in the Imparlance Roll were ſupplied in the Plea Roll after Verdict.

Amendm. 5. Hob. 76. 1 Cro. 46. 92. apres 93.

Hil.

Hil. 12 Jac. Rot. 420.

Parker *verſus* Parker.

Amendment 6.

THe Imparlance Roll was, Mich. 12 Jac. Rot. 547. Parker againſt Parker in Trover and Converſion, the Imparlance Roll wanted the day and year of the poſſeſſion and Converſion, but the Iſſue Roll was (after the Verdict and motion in Arreſt of Judgment) amended.

Mich. 2 Car.

Crocker *verſus* Kelſey.

Leaſe made by Feme in ſpecial tail. Hob. 259. 9 Rep. 141.

JOhn Canterſon and Agnes his Wife, Tenants in ſpecial tail, had Iſſue a Son, viz. John, and John the Father died, John the Son levied a Fine with Proclamations to the uſe of himſelf in Fee, Agnes leaſed to John Herring and Margaret his Wife (Leſſors to the Plaintiff) for one and twenty years, rendring Rent, &c. by vertue whereof they entred: Agnes died, John the Son entred, and afterward the ſaid John Herring and Margaret his Wife entred; And the ſaid John the Son made his Will in writing, and by that deviſed the Land to Kelſey the Defendant, and another in Fee, and died. John Herring and Margaret leaſed to Crocker the Plaintiff, who entred, and being ouſted by Kelſey, brought Ejectione firmæ: And this ſpecial Verdict being found, Judgment was given for the Plaintiff, and now affirmed upon Error brought in the Exchequer Chamber.

Mich. 2 Car.

Franklin *verſus* Bradell.

Conſideration in an *Aſſumpſit*.

FRanklin a Woman-ſervant, brought an action upon the caſe upon a promiſe againſt John Bradell: And count, that whereas ſhe had ſerved the Defendant and his Wife, and done to them loyal ſervice, the Defendant after the death of his wife, in conſideration of the ſervice

Paſt.

which the Plaintiff had done to the Defendant and his Wife, promiſed to pay her thirteen ſhillings four pence upon requeſt, and alledged

Requeſt.

requeſt and non-payment; And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, upon the Book of 13 Eliz. Dyer, that this is no ſufficient conſideration, becauſe that it is not alledged, that the Plaintiff at the requeſt of the Defendant had ſerved him: Alſo it was not ſufficient, becauſe it was done after the ſervice perfomed. And it was anſwered, that it was a good conſideration, and that the ſervice was to the benefit of the Defendant: And therefore in conſideration that the Plaintiff had married the Daughter of the Defendant, he promiſe to pay twenty pounds, it is a good conſideration; and ſo in conſide-

conſideration that you have been my ſurety to ſuch a man for ſuch a Debt, I promiſe to ſave you harmleſſe. And in conſideration that the Plaintiff was Baile for the Defendant, he promiſed to give him a Horſe, this is good: And in conſideration that I. S. being a Carpenter had well built my houſe, I promiſe to give him five pounds. And Judgment for the Plaintiff. Hobart 106. Contr. V. 1 Cro. 409.

Hil. 2 Car.

Hearne *verſus* Allen.

Entred 22 Jac. Rot. 1875.

Oxford. 1.

Richard Hearne brought an Ejectione firmæ againſt John Allen, for two acres of Land in Langham, upon a Leaſe made by Anne Keene, which was the Wife of Edward Keene; and upon Not guilty pleaded a ſpeciall Verdict was found. *Ejectione firmæ* 1 Croke 57.

Richard Keene was ſeiſed of an houſe in Chippin-norton, and of two acres of Land there in Fee, and of two acres of Meadow in Langham in Fee uſed with the ſaid Meſſuage, which were holden in Socage: And by his Will in writing, dated the 20. May, 30 Eliz. he deviſed the ſaid houſe *Cum omnibus & ſingulis ad inde pertinentibus, vel aliquo modo ſpectantibus*, to Thomas K. and his Heirs for ever: And for want of Heirs of him the ſaid Thomas, then to one Anne K. the Daughter of the Deviſor, and her heirs for ever: And for default, &c. then to John K. his Coſin and his heirs for ever; And by the ſame will deviſed his Goods and all his Lands to Eliz. his Wife, during her Widow-hood, and died. Elizabeth his Wife entred. Thomas the Son entred upon the Wife, and diſſeiſed her, and having enfeoffed one Edward K. in Fee with warranty &c. died, and Thomas K. alſo died without Iſſue: Edward K. by his Will deviſed the Land to Anne his Wife, the Leſſor of the Plaintiff for life, and died, Anne entred and made a Leaſe to the Plaintiff, *Et ſi ſuper totam materiam*, &c. And it ſeems that the Defendant Allen claim under the Title of Anne K. the Daughter, but that was not found, nor no other Title for the Defendant; and therefore of neceſſity Judgment ought to be given for the Plaintiff. And this caſe was well argued by Crawley for the Plaintiff: And *Henden* for the Defendant. And three Points were argued. Deviſe. Of a houſe Cum pertinentiis. If it Carries land.

1. If the two acres in Langham paſſed by the words Cum pertinentiis; and it ſeemed to the Court that they did not paſſe, without ſaying Cum terris eidem Meſſuagio ſpectantibus vel pertinentibus: And that is agreed in *Hill* and Granges caſe, by Conveyance, and 23 *H.* 8. 6. and it is all one in a Will. Alſo in this caſe it is not found for what time theſe two acres had been uſed with the houſe: And there was ſufficient to ſupply the words Cum pertinent. for ought that appears: And if the Law be ſo, the two acres do not paſſe, but diſcend to Thomas Keene and the Feoffment good. Pertinentiis.

2. If by theſe words it be an Eſtate-tail; as in Beresfords Caſe, Coke lib. 7. fol. 41. 9. E. 3. Fitz. tail 21. 12 E. 3. 7 E. 6. 16 Eliz. in Chapmans caſe, or a Fee-ſimple: And yet Yelverton and Crook inclined that it was Tayle or Fee. Dier 330 354. Heirs.

an Eſtate, tail; but Lord Richardſon, Hutton, and Harvey to the contrary, for an intent againſt Law ſhall be void, vide Abraham and Twiggs caſe, Coke lib. 7. fol. 41.

V.2.Cro.416.

3. If the collaterall Warranty which deſcended had extinguiſht and barred the right of Anne Keene. Henden would have maintained it, becauſe that the Warranty is ſpecial, although it was collaterall, that it did not Bar, which is ſans queſtion (be it ſpecial or general) it bars the others upon whom it deſcends, vide Coke lib. 10. Seamors caſe, he held no deſcent, and then no Bar, 12 E. 4. diſcontinuance 50. 7 H. 6. ſpeciall Warranty ſhall be uſed by Rebutter, but not by Voucher. And Judgment for the Plaintiff.

Warranty.

Smith *verſus* Aſh.

1 Croke 58. If a Feme ſhal have a *ſuperſedeas* upon an Exigent againſt Baron and Feme.

UN ſuperſedeas ſuit miſe for the Feme upon an Exigent againſt Baron and Feme: And upon much debate it was agreed, that the Feme (for the ſafegard of her ſelf from impriſonment) being returned upon the Exigent, or upon the Capias, viz. upon the one Quod reddidit ſe, upon the other Cepi, and as to the Husband (Non eſt inventus) may appear; and ſo long as the Proceſſe continues againſt the Husband, ſhe ſhall have idem dies: But when the Baron is returned utlegatus, ſhe ſhall be diſcharged ſans idem dies: And that ſtands well and reconciles all the Books. But whether ſhe ſhall have a Superſedeas de non moleſtando, is doubtfull, for by the 11 of H. 4. 89. and Dyer 271. if the Baron be outlawed, and the Wife Waived, and the King pardon the Feme, that ſhall be allowed, and ſhe ſhall go ſine die, and vide 4 E. 3. 34. and 14 H. 6. 14. 13 H. 4. 1. And it ſeemed by all to be agreed, that the Baron after he purchaſeth his pardon, or after he come and reverſe the Outlawry, he ſhall not have allowance of his Pardon, nor his appearance received, ſi non que il ameſne ſa feme qui par le preſumption de ley eſt ameſnable per luy, mes les baron n' eſt ameſnable per le feme, vide 18 E. 4. 4. there the caſe was, that a Feme Covert was ſued as Feme ſole, her Husband being beyond Sea, and not known to be alive, and ſhe was outlawed, and then her Husband came again, and brought a Writ of Error for the reverſall thereof in his name and in the name of his Wife; And there it is ſaid that it is queſtionable, being that he was no party to the Suit. And then one ſaid, that it would be a good way to be rid of a Shrew. And the Prothonotaries ſaid, that no Superſedeas was ever granted for the Wife in ſuch a caſe.

Hil. 2 Car.

Sir Charles Howards Caſe.

1 Croke. 59, Where the office of the keeper of a Park is gone if the King diſpark it.

MEmorand. That the Earl of Marleborough, Lord Treaſurer of England, came to Serjeants Inn in Chancery Lane, 6. Febr. and ther aſſembled all the Juſtices to have their opinion, upon a Caſe which was depending in the Exchequer Chamber, upon an Engliſh Bill for the King by the Attorney-generall, againſt Sir Charles Howard, for avoiding the poſſeſſion of a Lodge, and deſiſting from taking the profits of a Park called Purney Mooreclapp; the Cuſtody of which Park, and three pounds annuall Fee, with the Windfalls, &c. and the

cuſtody

cuſtody of the Lodge was granted to him. The King which now is, by his Charter diſparked the Park, and after granted all the Deer to Sir Richard Weſton Chancellor of the Exchequer: And whether by this diſparking of the Park the office of the Keepership be determined, or no; then whether the annuall Fee be determined; then if the caſuall profits, as Windfalls, &c. may be yet taken by Charles Howard who is the Patentee.

And upon debate it was unanimouſly agreed, that the King might diſpark his Park; and that by the diſparking thereof, the Office of the Keepership is gone and determined: for Sublata cauſa tollitur effectus, and this Office is not of neceſſity, and ſuch Offices are not preſumed in Law to be altogether for the benefit of the Patentee, but reciprocally for the Commodity of the King, and by the diſparking of the Park, the labor and charge is gone. Hob. 41.

It was alſo agreed, that the King might diſcharge the Patentee of this Office, although the Park continue. And if one grant the Stewardſhip of a Manor, and he diſmember the Manor, the Office determines; And if a Corporation grant the Office of Town-Clerk, or of Recorder, and after ſurrender their Patent, and take a new Patent, which incorporates them by a new name, all the Offices are determined. It was agreed that the annuall Fee certain remain in both caſes, be he diſcharged or be the Park diſparked, vide 5 E. 4. 9. 4 E. 4. 22. 18 E. 4. 9. Dyer 71. 6 H. 8. Kelway 171. Plowd. Sir Thomas Wrothes caſe. Kelw. 171.

The Earl of Lincolns Caſe.

Star-chamber.

MEmorand. That the Sollicitor Generall moved, that Sir Henry Fines had preferred a Bill againſt the Earl of Lincoln in this Court: and there was a Commiſſion de Dedimus poteſtatem granted to take his anſwer upon Oath; and he offered his anſwer upon his Honor. And the Commiſſioners returned this ſpeciall matter, and he prayed an Attachment: And this caſe was propounded to the Judges, and it was reſolved by them, the Lord Keeper, and all the Court of Star-chamber, that he ought to anſwer upon his Oath, for it is Juramentum purgationis, and not promiſſionis: Alſo it is no deminution of his Honor, to be ſworn concerning that which he would not have to be put upon his Honor. Alſo it is a good Rule, Teſti non jurato non eſt credend. in judicio: And Princes are ſworn to all their Leagues and Confederacies, which is called Juramentum confirmationis. 1 Croke 64. Where a Lord may be ſworn.

Hill. 2. Car.

Winſmore *verſus* Hobart.

Trin. 27 Eliz. Rot. 850.

Wilts.

IN an Ejectione firmæ brought by by Thomas Winſmore, againſt Michael Hobart, upon a Leaſe made by Edward Long, the Jury gave a ſpeciall Verdict.

William

Habendum to parties not named in the premiſſes.

William Lord **Sturton**, ſeiſed of the Tenements (in the Count) in Fee, by Indenture demiſed them to **Thomas Hobart**, habendum to the ſaid Thomas **Hobart**, and to the ſaid **Michael Hobart**, **John Hobart** and **Henry Hobart**, Sons of the ſaid **Thomas** for their lives, and the life of the Survivor of them ſucceſſively; By vertue whereof the ſaid **Thomas** entred, and was ſeiſed for life. And the Lord **Stutton** granted the Reverſion to **Thomas Long** in Fee, to whom **Thomas Hobart** attorned, **Thomas Long** deviſed it to **Edward Long** in tail, **Edward Long** died ſeiſed, and the Reverſion deſcended to **Edward** his Son, the Leſſor of the Plaintiff, **Thomas Hobart** and **Henry** died, **Michael** and **John** ſurvived, **Michael** entred, **Thomas Long** entred upon him, and made a Leaſe to the Plaintiff, who entred, and was poſſeſſed, untill the Defendant ouſted him. And Judgment was given for the Plaintiff,

1 Inſt 41. b. 3 Bul. 136. Apres. 89.

V. 6 Rep. 13. V. Owen 39. Hob. 314. 315. 2 Leon. 1.

The Habendum was void as to all them which were not parties to the Deed.

Paſch. 3 Car.

Hartopp and Cock's Caſe.

Entred Paſch. 2 Car. Rot. 1761.

Hertf.

Advowſon in groſſe for life.

A Quare Impedit **was brought by** George Hartopp **and** Cocks **againſt the Biſhop of** Lincoln, **Lord Keeper of the great Seal**, Mary Hewes, **and** David Dublin **Clark for the Church of** Eſſington. **The Iſſue being joyned by the Incumbent upon the Appendancy, the Evidence given to the Plaintiff to prove it was ſuch.**

Henry 6. was ſeiſed of the Mannor in Fee, and granted it to **Mary** his Conſort for life, *Habendum una cum advocatione* of the ſaid Church: The Queen **Mary** preſented, and after there was a Preſentment by Laps, then the ſaid Queen preſented again; And afterwards **Edward** the fourth ſeiſed of the ſaid Mannor, preſented, and then **Henry** the ſeventh, and **Henry** the eighth: And the King **Edward** the ſixth granted the Mannor and other Mannors, and the Advowſon to Sir **John Pawlet** in Fee, reſerving Tenure in **Capite** for the Mannors, and Socage Tenure for the Advowſon: And the ſaid Sir **John Pawlet** granted the Mannor and the Advowſon to **William Tooke** in Fee, who preſented the laſt Incumbent; and under this Title the Plaintiffs entitle themſelves.

The Defend. ſaid, that the ſaid **William Took** was ſeiſed of the ſaid Advowſon, and it deſcended to **William Took** the ſon who granted the next avoidance, and it came to **Mary Hewes** who preſented the Defendant **Dublin**, and the Evidence to prove that it was in groſſe, was **Henry** the third being ſeiſed in Fee of the Mannor of **Eſſinton** made a Leaſe thereof to his Brother for life, and excepted the Advowſon, and then upon the expreſſing of the Advowſon, upon the Grant of **Edward** the ſixth, and the reſervation of ſeverall Tenures; And this was their Evidence.

And Serjeant Henden **maintained, that by this exception of the Advowſon, when it was granted for life, made it to be in groſſe for ever:**

And

And he vouched 38 H. 6. 13. Quare Impedit by the King againſt the Abbey of Sion, and the Incumbent there, by the Exception of the Advowſon it was become in groſs, and there one ſaid, at leaſt during the Eſtate for life, and that is all which is implied by the Book, for the Judgment is for the King, becauſe that it being not appendant, is paſſed not by the Grant, by the Habendum una cum, &c. And though that the Court unement agreed that it is but in groſs, for the Eſtate for life, and that is all one, as if the King had granted the Advowſon which is appendant for life, and the Grantee dies, and the Advowſon is appendant again, and yet he inſiſted and perſiſted to have a ſpecial Verdict found thereupon: And I moved my Brother Yelverton, that before we admit of a ſpecial Verdict (as it hath been uſed in former times) to go to the Judges of the Kings Bench, and to put the caſe to them, to know their opinion, and when he came again, and declared it, we put it upon the Jury to try the matter, and they came in and found for the Plaintiff; And after that the Demurrer, which was joyned for the other Defendant Mary, was by conſent entred for the Plaintiff, vide Dyer 34. in appeal, vide 7 H. 6. 36.

Habendum devant 88.

Chidley's Caſe.

CHidley brought a Quid juris clamat, and had Judgment againſt the Defendant; and the Plaintiff had made a Warrant to his Attorney for the receiving of his Attornment, and the Defendant would have attorned, but would not do his Fealty: And the Preſidents were, that he ought to be ſworn in Court; and the entry of the Judgment is, that he did attorn: And fecit fidelitatem, and ſo he was ſworn in Court, vide 37 H. 6. 14. If he refuſe to attorn being in Court, he ſhall be committed for contempt: Moyle ſaid, that that is Attornment, but Priſot ſaid, that he ſhould not have a Writ of Waſt, nor arraign an Aſſiſe until he aſſent.

Quid juris clamat. Attornment Judg. and Fealty.

Trin. 3 Car. Rot.

Humbleton *verſus* Buck.

Lincoln.

SImon Humbleton brought an action upon the caſe againſt Buck, and counted, that whereas a Controverſie was between the Inhabitants and Tenants of Fletam, and one Palmer, for and concerning the having of Common in one parcel of Land which was a Sea-bank, in which they had Common of Paſture, for taking by Cattel, and alſo by taking & cutting the Graſs: And whereas the ſaid Palmer had brought an action of Treſpaſs againſt the now Plaintiff, for entry made by him in the ſaid Cloſe, and for taking his Graſs, pretending that the ſaid Land in which he claimed Common was his ſeveral, and free from their claim of Common, the Defendant in conſideration that the Plaintiff had given to him a Jugg of Beer, and that he at the requeſt of the Defendant would proſecute and defend the ſaid Suit for the maintenance of their Common againſt the ſaid Palmer, until the determination

Caſe. *Aſſumpſit* in conſideration of defending Suit in maintenance of a Title of Common.

termination thereof, he promiſed to pay to the Plaintiff one moiety of his charges, and over and beſides twenty pounds, and that thereupon he defended the ſaid Suit, and pleaded Not guilty, and at the trial thereof Palmer was nonſuited, and that, that was for the maintenance of the Common, and that he expended in defence and proſecution of the ſaid Suit forty pounds.

The Defendant confeſſed all the Inducement, and alſo a promiſe ſub modo, and ſaid, that the ſaid Palmer had brought Treſpaſs, to which the Plaintiff had pleaded Not guilty, abſque hoc, that the ſaid ſuit and trial was for the ſaid Common; And Iſſue being joyned it was found for the Plaintiff, and damages to twenty pounds. And in Arreſt of Judgment it was moved, that now it appears, that it was not for the maintenance of the Title of Common, and that it could not be for the trial thereof, becauſe he did not plead the Title of Common, which had been the proper and apt way for the trial thereof: And when the Jury find that which is contrary and repugnant to Law, that is repugnant and not good. And this caſe was ſtrongly argued by Serjeant Davenport in Arreſt of Judgment, and by Atho for the having of Judgment: And firſt he ſaid, That although there was a Parlance and Communication concerning the Common, yet the promiſe is to defend this action brought by Palmer, and is pro defentione of the Common, not generally, but againſt Palmer, and the promiſe is to pay the moiety of the Charges, if he proſecute the ſaid Suit, until the determination thereof, ſo that if it had been found againſt the now Plaintiff, the now Defendant ought to have paid the moiety of the ſaid Charges: And it is not agreed that he ſhall plead title by Preſcription for the Common, but that he ſhould proſecute it until the determination of the Suit, for the maintenance of the Common. And the Court gave Judgment for the Plaintiff, for it might be for the maintenance of their Common againſt Palmer, for if he had not the Soil thereof, but had incloſed it as part of his Waſte, the Plaintiff could not plead the title to Common without admitting the Soil and Free-hold to be in Palmer: And if one had been of counſel, and to adviſe a Plea, if he had not diſcovered that Palmer had no title, he would have adviſed him to have pleaded Not guilty; for if the ſaid Palmer had no title to the Soil (which the now Plaintiff could not know) it ſhould be found againſt him; and ſo this Plea might have been in maintenance of Common.

And the Lord **Richardſon**, who at firſt doubted, now concurred, and ſaid, that he was fully ſatisfied.

Trin. 3 Car.

Chapman *verſus* Chapman.

Debt.

1 Croke 76.

Hob. 8.

REbecca Chapman brought an action of debt againſt Henry Chapman, upon an Obligation with Condition to perform the Covenants contained in certain Indentures. The Defendant pleaded a general performance, the Plaintiff replied and ſhewed, that ſhe made a Leaſe to the Defendant of certain Cole-pits, rendring eighty pounds

Rent,

Rent, and that the Defendant did not pay the Rent at the day, whereupon the Defendant demurred. Obligation conditioned for the payment of Rent, demand is not neceſſary to be alledged after general performance pleaded.

And it was adjudged upon Argument for the Plaintiff: but the matter upon which the Defendant juſtified came not in queſtion, viz. If the Plaintiff ought to have demanded the Rent: And that the Obligation had not altered the nature of the Rent, it being general to perform all Covenants: and the reaſon is apparent, for when the Defendant plead performance of all the payments, that is intended an actual payment, for he cannot now return, that he made tender, for that ſhall be a departure from his Plea. And that was the reaſon of the Judgment which was Paſch. 43 Eliz. between John Specot Plaintiff, and Emanuel Shere Defendant, upon the like caſe in debt upon an Obligation, whereas the Defendant had granted an Annuity or Rent of ſix and twenty ſhillings eight pence to the Plaintiff, for one and twenty years, the Condition was, that if the ſaid Shere perform all the Covenants, &c. contained in the ſaid Writing, ſo that the Plaintiff may enjoy the Rent according to the intent thereof, then, &c. the Defendant recited the Deed and pleaded performance, the Plaintiff replied that the Defendant had not paid the ſaid eight and twenty ſhillings eight pence upon ſuch a Feaſt, whereupon the Defendant demurred, and adjudged for the Plaintiff. And the Lord Coke in his private Book (as the Lord chief Baron ſaid) had ſhewn this reaſon: If the Defendant had pleaded ſpecially, That he was upon the Land, and ready to pay, and to make tender, but the Plaintiff did not come to demand it, then the Plaintiff ought to ſhew that he did demand it, which ſeems to be agreed, 14 E. 4. 4. 2 H. 6. 57. 11 E. 4. 10. 21 E. 4. 42. but Brook 6 E. 6. Tender, makes this diverſity, when the Condition is expreſſed to pay the Rent, that alters the nature of the Rent: But otherwiſe when it is to perform Covenants. And the Judgment given in the Kings Bench was affirmed. *Specot* and *Shere*. Hob. 8.

Trin. 3 Car.

Stephens *verſus* Oldſworth.

IN a Quare Impedit brought by Stephens and Croſs againſt Oldſworth and Holmes, for the Church of Lechamſeed, the Incumbent pleaded, that he was Parſon Imparſonee to the Church, of the preſentation of the King, and confeſſed the Seiſin of Sir Anthony Greenwood (under whom, by the grant of the next avoidance the Plaintiffs claim) but ſaid, that the ſaid Sir Anthony held the ſaid Manor of the King, per redditum ac wardam Caſtri Dover, to be paid yearly 8 s. 1 d. ob. q. And among other matters (which I omit) it was reſolved that it was Socage Tenure, for a Rent for Caſtleguard is Socage, vide Littleton 26. Coke lib. 4. fol. 6. 5 E. 4. fol. 128. F. N. B. 256. a. *Quare Impedit.* Tenure. Caſtleguard, Socage.

Mich.

Mich. 3 Car.

Young *verſus* Young.

Formedon in Deſcender. Act of Court ſhall be amended. 1 Croke 86.

IN a Formedon in the Deſcender, brought by Young againſt Young, the Demandant was within Age, and was admitted to proſecute by his Guardians, and that appears by a general admittance, before Juſtice Jones: And this admittance was firſt entred in the remembrance of Gulſtons Office, and afterwards in the Plea Roll: And the Demandant which is admitted by the Court, viz. per Guardianos ad hoc per Curiam admiſſus, and there the Conceſſit per Curiam quod proſequatur per Gardianos is entred, and ſo is the Roll upon the View. And in the Philizers Roll the recital is, That the Demandant per Gardianos admiſſus obtulit ſe. And in this Roll the Conceſſit per curiam of admitting the Demandant to proſecute by his Guardian is not entred. And after Verdict, and Judgment for the Demandant, a Writ of Error was brought, and that aſſigned for Error: And it was moved that it might be entred upon the Philizers Roll. And it was reſolved by all the Court that it ſhould be ſupplied and entred upon the Philizers Roll; and the principal reaſon was, becauſe that this admittance by his Guardians, is the act of the Court, and not like to the entry of the Warrant of Attorney, nor to the Eſſoin Roll, vide Dyer 330. otherwiſe it is of Admiſſion by Prochein ami, vide Rawlins caſe, Coke lib. 4. fol. 53. The uſe of the Kings Bench is never to enter the Admiſſion, but only to recite it in the Count, vide 11 H. 7. Rot. 412. In a Writ of Right by Baron and Feme, and another Feme Infants, there per cuſtodes good, vide 8 E. 4, 5. for the Mainprize entred in another Term, lib. Intrationum fol. 366. It was vouched by Croke, and affirmed by Yelverton in one Simpſons caſe in Durham, where the Tenant was by Prochein amy, where it ſhould be by Guardian, was Error. The Preſidents are, that an Infant when he ſue, may be by Guardian, or Prochein amy, the one or the other; but when he is ſued, it ſhall be by Guardian.

Where an Infant ought to appear by Guardian, and where by *Prochein amy.*

Simpſons caſe.

1 Croke 161. 1 Inſt. 135. b.

Mich. 3 Car.

Wolfe *verſus* Hole.

Amendment. 1 Cro. 92. 594. Hob. 101. acc.

WOlfe an Attorney Plaintiff againſt Hole, by a Writ of Priviledge, and he Count upon an Aſſumpſit: And after Verdict given and Judgment, a Writ of Error was brought, and moved that there was a default in the Imparlance Roll: viz. fault de trover pledges, which was as it ought to be in the Plea Roll: And it was moved that it might be amended, and after debate at Bar, by Henden and Davenport, it was reſolved that the not finding of Pledges is not matter of form, but matter of ſubſtance, and it concerns the King, for if the cauſe to amerce the Plaintiff, the Judgment is, Ideo le Plaintiff & ſes pledges ſont Amerce, and that it is not aided by the Statute of 18 Eliz. quod quære, and vide 12 Eliz. Dyer 288. there is a Caſe written by me, that An. 17 Jac. was amended after the Verdict; and in one Hillaries

Pledges matter of Form, Subſtance.

ries caſe, and vide there in Dyer, that the Plaintiff when he is ſued by Priviledges, ought to find pledges, and that as well, as when a Bill is filed againſt an Attorney. But now, becauſe that it was aſſigned for Error, and that if it be amendable, the Juſtices of the Kings Bench would amend it, this Court would not; but if it had been in the Imparlance Roll, and omitted in the Plea Roll, it ſhould be amended, vide 18 E. 4. 9. that Pledges may be entred at any time. Devant 83.

Hil. 2 Car. Rot. 565.

Hilton *verſus* Paule.

Richard Hilton brought an action of Treſpaſs againſt Robert Paule, for the taking of a Saddle at Stoke Goldenham: And upon Not guilty pleaded, the Jury gave a ſpecial Verdict, Viz. Treſpaſs. 1 Croke 92.

That the Pariſh of Hinkley was *de temps dont memory, &c.* and yet is an ancient Rectory, and a Church Parochial; And that the Town of Stoke-Goldenham is an ancient Town, and parcel of the Rectory of Hinkley. And that from the time of H. 6. and afterwards until this time, there hath been and is in the Town of Goldenham, a Church, which by all the ſaid time hath been uſed and reputed as a Pariſh: And that the Inhabitants of Stoke-Goldenham by all the ſaid time had had all Parochial Rights, and Church-wardens; And that the Town of Stoke-Goldenham is diſtant two miles from Hinkley. And the Verdict concluded, if it ſhould ſeem to them, that Stoke-Goldenham is a Pariſh for the relief of their own Poor, within the Statute of 43 Eliz. cap. 2. then they find for the Plaintiff, if not for the Defendant. Which ſhall be ſaid a Pariſh Church within the Act of 43 *Eliz.* for the maintenance of the Poor. 43 Eliz. cap. 2.

And this Caſe was argued by Serjeant Barkley, and he vouched Linwood fol. 89. and ſaid, that there is Eccleſia major & minor, and a dependant Church upon the principal, and another Church, and which is found to be uſed and reputed, ergo it is not a Pariſh. And that the Exception of the Chappel of Foulnes, which by the Statute is made a Pariſh, proves that Chappel and Pariſh are not within the Statute: he vouched 4 E. 4. 39. and 5 E. 4. to prove that divers Town may be one Pariſh. Town. Pariſh.

And the Lord Richardſon ſaid, that it is a clear caſe, that this is a Pariſh, within the intent of the Statute of 43 Eliz. for the relief of their own Poor; And that the Church-wardens and Overſeers of Stoke-Goldenham might aſſeſs for the relief of the Poor. And though it be found that after the time of *H. 6.* and until now, it had been uſed as a Pariſh Church, that doth not exclude that it was not uſed ſo before. And a Reputative Chantery is within the Statute of Chantries, 1 E. 6. And this Statute being made for the relief of the Poor, and that they might not wander, therefore the intent of the Statute is to confine the relief to Pariſhes then in eſſe, and ſo uſed: And every one of the Court delivered their opinion, and concurred: And ſo Judgment was given for the Plaintiff. Pariſh by reputation within the Stat. 43 *Eliz.*

Hil. 3 Car.

Peto *verſus* Pemmerton.

Mich. 3 Car. Rot. 414.

Replevin. 1 Croke 101. Where Grantee of a Rentcharge takes a Leaſe of part of the Land, and ſurrenders it, the Rent ſhall be revived.

SIr Edward Peto **knight**, brought **Replevin** againſt Robert Pemmerton and Giles Thompſon; **The Defendants** made **Conuſance** as **Bayliffs** to Humphrey Peto, and that Humphrey **the Father** of the ſaid Humphrey **was** ſeiſed **of the place** in which, &c. in **Fee**, and by his **Deed** granted **the Rent** of ſix pounds to the ſaid Humphrey **his Son** for life out thereof, to **Commence** after the **Death** of the Grantor, and **ſhewed** that Humphrey **the Father died**, and for **Rent** arrear, &c.

The Plaintiff in Bar to the **Avowry** confeſs the grant and ſeiſin of **the Land**, and that **the** ſaid Humphrey **died** ſeiſed of the Land out of **which the Rent** was granted, and that that deſcended to William, and from William **to the Plaintiff**, who entred, and demiſed to the ſaid Humphrey **the Son**, **parcel** of the **Lands** unde, &c. for five hundred **years**, by force of which Leaſe, the ſaid *H*umphrey **had** entred and was poſſeſſed.

Surrender not good till agreement.

The Defendants replied, that afterwards and before any part (for which they made Conuſance) was arrear, the ſaid Humphrey **the Son** ſurrendred the ſaid **Leaſe** to **Sir** Edward Peto, **to which** ſurrender the ſaid **Sir** Edward agreed, whereupon **the Plaintiff** demurred.

And this Caſe was argued by *H*enden, and he ſaid, **that when** the act of him who had the **Rent** made the ſuſpenſion, his act alone could not revive it; **But a Rent** ſuſpended might be revived by act of **Law**, or by the joynt act or agreement of the parties by whom the ſuſpenſion was made, 21 *H.*7.7. 19 *H.*6.4. 19 *H.*6.45. 7 *H.*6.2.

Suſpenſion. Extinguiſhment.

As for the perſonal things, when they are ſuſpended, they are extinct, unleſs it be in auter droit, as if **Feme Executrix** take the Debtor to Husband, and the **Baron dies**, the **Wife** ſhall have an action of Debt againſt his Executors.

One reaſon in this caſe is, becauſe that by the ſurrender which is accepted, the Contract is determined, and that is by the act of both.

And by the ſurrender the Eſtate for years is extinguiſht to all purpoſes, as to that to which the ſurrender was made, as if he had granted a Rent, now it ſhall commence, and he is ſeiſed in Fee, and may hold it charged with both the Rents, 2 *H.*5.7. 5 *H.*5. 34 Aſſ. 15.

Vide Doct. & Stud. 19. b. Dyer 349.

And this Eſtate ſurrendred is in Eſſe, as to the benefit of ſtrangers, but not as to the benefit of him who accepted it, for he is ſeiſed in Fee, vide Lillingſtons caſe.

And the Court was of opinion, that the Rent was revived, and that the Contract is now determined. Nota, that this grant to Humphrey the Son for years, was but upon confidence to aſſign it over.

If Grantee of an Eſtate for life of a Rent, take an Eſtate for life of part of the Land, and ſurrender it, yet the Rent is not revived, for it was extinct in this caſe, if he had granted his intereſt, quære, and if he had granted his intereſt over to I.S. and he had ſurrendred it, that ſhall not revive the Rent, becauſe that he had by his granting over of his intereſt

tereſt, diſcharged of the Rent extinguiſh it, quære: but in the principal caſe the Rent was ſuſpended by the acceptance of the Leaſe, and is revived by the ſurrender. And it was agreed; that where Leſſee for years ſurrender, to which the Leſſor agree, and accept it, the poſſeſſion and the intereſt is in him without entry.

Hil. 3 Car.

Sandford *verſus* Cooper.

SAndford brought a Scire facias againſt Cooper to have execution of a Judgment for ſixteen pounds, which Judgment was de Oct. Hil. An. 2 Car. And one being returned Ter-tenant, pleaded that after the Judgment, viz. 22 Jan. he (againſt whom the Judgment was) viz. John Bill acknowledged a Statute-ſtaple, and ſhewed, that by that the Land was extended, and after upon liberate delivered in Execution, and demand Judgment, whereupon the Plaintiff demurred. *Sci. fac.* 1 Croke 102.

And the ſole queſtion was, to what day the Judgment ſhall have relation, for it appears in the pleading, that the twentieth day of January was the day of Eſſoin; and it ſeemed to the Court that the Judgment ſhould have relation to the firſt day of this return, as well as if it had been a return in the Term, viz. 15 Hil. for otherwiſe it ſhould be uncertain. And he may be Nonſuited upon this day, vide 5 Eliz. Dyer fol. 200. That a recovery being in the firſt return, the Warrant of Attorney made and dated the fourth day, is taken to be a warrant after Judgment, and vide 33 E. 6. fol. 45, 46. the principal caſe there: If a Niſi prius taken after the day of Eſſoin, ſhall be good, and it is adjudg'd not, for the firſt day is the return: And it was agreed, that in Common Parlance, the firſt day of the Term is the fourth day, viz. If one be obliged to appear, or to pay Moneys the firſt day of ſuch a Term, Loquendum eſt ut vulgus. But the Law relate the Judgment to the firſt day of every return, vide Dyer 361. a Releaſe pleaded after the Barrein Continuance, which was dated the one and twentieth of January, which was the day after the Eſſoin day, and it was not good, for it ought to be before the utas Hilarii: and my Brother Harvey and Crook vouched one Gillinghams caſe, viz. A releaſe of all Judgments before the fourth day, and after the day of Eſſoin would not releaſe this Judgment, which was de Octab. Hil. vide many caſes vouched to this purpoſe, 4 E. 3. 34 H. 6. 20. a Writ of Error brought after the Utas, and before the fourth, that is good, and brought after Judgment, vide 22 H. 6. 7. a. a Writ of Error ought to be brought after the Judgment rendred, or otherwiſe no Execution ſhall be ſtayed. And all the Court gave Judgment for the Plaintiff in this Scire facias.

To what day a Judgment ſhall have relation.

Dyer 200. 1 Bul. 35.

Gillinghams caſe.

Hil.

Hil 3 Car.

Holt *verſus* Sambach.

Trin. 2 Car. Rot. 731.

Replevin. 1 Croke 103, 405.

SIr Thomas Holt brought Replevin againſt Thomas Sambach, in which upon Demurrer the Caſe was:

Tenant for life (with a remainder to him in tail expectant, and remainder in fee) grant a rent in fee, and afterwards had fee by fine.

Sir William Catesby being Tenant for life of Land (the remainder in tail to Robert his Son, remainder in tail to himſelf; remainder to Robert in general tail, the remainder in Fee to himſelf) granted a Rent of ten pounds by the year out thereof to William Sambach in Fee, and Sir William and Robert his Son levied a Fine with Proclamations, which was to the uſe of the ſaid Sir William in Fee, and afterwards the ſaid Sir William enfeoffed Sir Thomas Holt, and died; Robert had Iſſue Robert and died: And the Court was of opinion, that this Grant in Fee is good, for he had an Eſtate for life in poſſeſſion, and an Eſtate of remainder in tail, and remainder in Fee in himſelf to charge, and then the Fee-ſimple paſs by the Grant: And although that Robert the Son might have voided it, yet when he had barred the Eſtate tail, &c. by Fine to the uſe of Sir William, now Sir William Catesby had by this acceptance of this Eſtate to himſelf, avoided the means by which he might have avoided the Rent. And although that in Bredons caſe, in the firſt Book, when Tenant for life, and he in the remainder in tail joyn in a Fine, rendring Rent to Tenant for life, that paſſeth from every one, that which lawfully might paſs, and that the Rent continue after the death of him in the Remainder in tail without Iſſue; yet in this caſe the Eſtate is barred by the Fine, and united to that Eſtate, which William the Grantor had, and now William is ſeiſed in Fee, and this Rent made unavoidable.

1 Rep. *Altonwoods* caſe, fo. 48. b. *per Periam.* 1 Inſt 47. b.

Avowry for part of a Rent, not alledging the reſt ſatisfied. 1 Croke 104. 436. acc.

The Caſe was well argued by Henden and Davenport, but it appeared that the Conuſance was for twenty ſhillings, part of the rent of fifty pounds behind, and for fifty pounds, parcel of two hundred pounds arrear for Nomine pœnæ, and did not ſay in his Avowry, that he was ſatisfied of the reſt: And therefore Judgment was given for the Plaintiff, vide 20 E. 4. 2. a. 48 E. 3. 3.

Chichley *verſus* the Biſhop of Ely.

Quare Impedit. 1 Croke 104.

DAme Dorothy Chichley brought a Quare Impedit againſt Nich. Biſhop of Ely, and Mark Thompſon the Incumbent for the Church of Wimple, and counted, that Thomas Chichley was ſeiſed of the Advowſon of the ſaid Church in Fee as in Groſs, and preſented to it being void, Edward Marſhall which was Inſtituted and Inducted, and afterward the ſaid Thomas Chichley died ſeiſed, and the Advowſon deſcended to his Son and Heir Sir Thomas Chichley, who by his Deed indented, &c. for the increaſe of the Joynture of the Plaintiff, granted the ſaid Advowſon to Thomas Eaſt, and Edward Anger and their Heirs, to the uſe of the ſaid Plaintiff for life, and afterwards to the uſe of the

Traverſe upon Traverſe.

Heirs

Heirs Males of the body of Sir Thomas Chichley; and that by force thereof ſhe was ſeiſed for life: And the Church being void by the death of the ſaid Edward Marſhall ſhe preſented, and the defendants diſturbed her.

The ſaid Biſhop died, and the Defendant plead that he is parſona imparſonata ex preſentatione Domini Regis nunc: And ſaid, that Sir Thomas Chichley was ſeiſed in Fee of the ſaid Advowſon, and alſo of the Mannor of Preſton, and divers other Lands in the County of Cambridge, which Mannors and Lands were holden of King James in Capite by Knights-ſervice, and being ſo ſeiſed he died, and that this Advowſon and the Mannor deſcended to Thomas Chichley his Son and Heir, who at the time of his death was within age: And that afterwards by force of a Writ of Diem clauſit extremum this matter was found, whereby the King ſeiſed the body, and was poſſeſſed of the Mannor and of the Advowſon, and that the ſaid King James died, & the King which now is ſuſcepit regimen hujus regni, and was poſſeſſed, and the Church became void; and the King by his Letters Patents under the great Seal, preſented the Defendant Thompſon, and traverſed the Grant made by Sir Thomas Chichley, to Thomas Eaſt and Edward Anger of the ſaid Advowſon, as the Plaintiff had alledged.

The Plaintiff replyed proteſtando, that the Defendant is not Parſon Imparſonæ, and that the Plea is inſufficient, Pro placito dicit, quod non habetur aliquod tale recordum, talis inquiſitionis poſt mortem prædicti Thomæ Chichley militis modo & forma prout, whereupon the Defendant demurred.

And after many Arguments at Bar, by Atho, Henden, Davenport, and Hedley it was adjudged for the Defendant, And that the Title of the Plaintiff being traverſed, it ought to have been maintained, and not to traverſe other matter alledged by the Defendant, for Traverſe upon Traverſe is only when the matter traverſed is but Inducement: Alſo it appears fully that the King is intituled to this Preſentation, though there was not any Office, vide 21 E. 4. 14. H. 7. and then all the Titles of the King ſhould be anſwered, and therefore the denial of the Office is not material: for if he dies ſeiſed the King may preſent without Office; vide Bendoes caſe, 21 Eliz. Rot. 1378. Crachford againſt Gregory Lord Dacres, when the King is entituled by Office to an Advowſon, though the very Title be in a ſtranger, yet if the Church be void, and he which hath Title preſent, this is but Uſurpation.

Vide 17 H. 7. Kel. 43. 11 H. 8. ibid. fol. 200. vide 21 E. 4. 1. 5 E. 4. 3. for 13. of things which lye in Grant, the King is in actuall poſſeſſion, 20 E. 4. 11. Stamf. fol. 54. 2 R. 3. iſſue 7. 28. 23 H. 8. Kel. 97. new Book of Entries fol. 130. vide there that Traverſe is allowed to be taken upon Traverſe; vide for that 9 H. 7. 9. 10 E. 4. 49. Dyer 107. 10 E. 4. 2. 3. 6. E. 3. 7. *Crachfords caſe.*

When two Titles appear for the King as here, the dying ſeiſed of the Advowſon of Sir Thomas C. who alſo died ſeiſed of the mannor of Preſton holden in Capite, that is a good Title, and the Office found is another Title, and both to be anſwered in caſe of the King, vide for that matter, 37 H. 6. 6. 24 E. 3. 27. 46. E. 2 25. 9 H. 6. 37. 39 *H.* 2. 4. 40 E. 3. 11. In caſe of ſeveral charges to the King, although the King be not party, yet they ought to be anſwered.

Hedley Serjeant argued for the Plaintiff, that the preſentment of

the King tolls all the right of the Plaintiff, and therefore only ought to be anſwered, and he ought not to traverſe the Title of the Plaintiff, which by the Plea was toll'd; but notwithſtanding, that he anſwered not the dying ſeiſed of the Advowſon, and the Tenure, by which the King is intituled upon the Office, and therefore all is one: And the Plaintiff had waved his Title, and not maintained it: And therefore Judgment was given for the Defendant.

Paſch. 4 Car.

Congham's Caſe.

Reſcous by the Plaintiff in the primer action. 1 Croke 109.

IN an action upon the Caſe againſt Congham and his Wife, That whereas the Plaintiff hath recovered in Debt againſt one, and had a Writ of Capias ad ſatisfaciendum directed to the Sheriff of Cambridgeſhire, and the Sheriff had arreſted the party, and had him in Execution for the Debt, that Defendants reſcued the party, and he eſcaped: Upon Not guilty pleaded the Feme was found guilty of the Reſcous: And it was moved in Arreſt of Judgment by Aleph, that this action lies not, becauſe that Debt lies againſt the Sheriff: And the Sheriff ſhall have an action for the Reſcous, vide F.N.B. 102. And properly this action of Reſcous lies where it is upon mean proceſſe, and that is for the delay by the Reſcous, and damage may be greater or leſſer accordingly: And the Reſcous is according to the condition of him, which is arreſted, for if he may be eaſily taken again, and that he becomes not more poor, that then the damage is the leſſe, vide 16 E. 4. fol. 3.

Hob. 180.

But after divers motions at Bar Judgment was given for the Plaintiff. And the Lord Richardſon held ſtrongly that it lies. And this Tort may be puniſht at the Suit of the party who had damage thereby, viz. the party, the Sheriff or Baily: And *Harvey* and Crook agreed, but Yelverton and my ſelf doubted thereof, becauſe that it is an immediate wrong to the Sheriff or Baily, and the party had no prejudice in common preſumption, becauſe that his action is transferred to the Sheriff, who hath more ability to ſatisfie him.

Dyer 241.

Farrington *verſus* Caymer.

1 Croke 112. Information where it ſhall be brought. 23 H. 8 c. 4.

LIonell Farrington qui tam pro ſe quam pro, &c. brought an Information againſt William Caymer, upon the Statute of 23 H. 8. cap. 4. againſt Ale-brewers and Bear-brewers, for ſelling Bear at higher prices then were aſſeſſed by the Juſtices, upon Not guilty pleaded, the Plaintiff had a Verdict at Norfolk Aſſiſes.

And it was moved in Arreſt of Judgment, that the Information was brought in the Common Bench, and yet it was brought and tryed in the proper County where the Offence was committed, whereas by 33 H. 8. cap. 10. 37 H. 8. cap. 7. 21 Jac. cap. 4. it ought to be brought in the Country, and not in the Common Pleas.

And

And upon grand deliberation and hearing of Councell of either part the Court reſolved that Judgment ſhould be given for the Plaintiff. And firſt it was agreed, that (whereas by the Statute of 23 H.8.cap. 4. which appoint that the Juſtices of Peace aſſeſſe the priſes of Barrels and other Veſſels of Beer; and that they which ſell againſt that rate forfeit ſix ſhillings, &c. to be recovered by action of Debt, Bill, Plaint, or Information in any Court of Record, in which no wager of Law, &c. and gives one Moyety to the party which will ſue, and the other to the King, no action may be brought in any Court of Record, but onely in one of the four Courts of Record at Weſtminſter.

And the proof thereof, ſee Coke lib. 6. fol. 19. Gregories caſe, and Dyer 236. a.

Then the principall and ſole point will be, if this Offence will be by the act of 33 H. 8. cap. 10. made preſentable and puniſhable by the Juſtices of Peace; at their ſix weeks Seſſions; and it was unanimouſly agreed that it is not. Firſt, becauſe the preamble of the act recite, that the Offences recited therein eſcape puniſhment, and for their more ſpeedy and effectuall puniſhment, and repeat the particulars, but therein name not Brewers by expreſſe words, and it cannot be intended that the intent of the Statute was to give them at their ſix weeks Seſſions, to intermeddle with things not determinable at their generall Seſſions. And it was objected by Atho, that Lambert and Crompton had put it as an Article of their charge: To which it was anſwered, that it was in ſome reſpect inquirable at Common Law, viz. Mildemeanors in Bear-brewers, Conſpiracies and agreements to ſell at ſuch priſes, and the making of unwholeſome Beer. Alſo it might be that they take the Law to be upon the Statute of 23 H.8. that the Seſſions being a Court of Record was within this act, that ſaies in any Court of Record: And then if it be not ſuable by Information before the Juſtices of Peace, the conſequence is plain, that the Statute of 21 Jac. cap. 4. extends not thereto, and the Statute of 37 of H.8. makes not any thing in this caſe, but tolls the ſix weeks Seſſions, and makes it inquirable at the generall Seſſions. 1 Cro. 146.

Ideo Judgment for the Informer.

June 19. An. 22. Jac.

MEmorand. That upon a Conference at Serjeants Inn in Fleet-ſtreet, it was reſolved and agreed, by Lord chief Juſtice Sir Jeames Lea, the Lord Hobart, Baron Bromley, Baron Denham, Juſtice Hutton, and Juſtice Jones; That any one may erect an Inn for lodging of Travellers, without any allowance or License, as well as any one before the Statute of 2 E.6 might have kept a Common Alehouſe, or as at this day one may ſet up to keep hackney Horſes, or Coaches, to be hired by ſuch as will uſe them: And all men may convert Barley into Mault, untill they be reſtrained by the act of Parliament made for that purpoſe. And as all men may ſet up Trades not reſtrained by the Act of 5 Eliz. which directeth, no man that hath not been bound, or ſerved as an Apprentice by the ſpace of ſeven years, or by reſtraint of ſetting up Trades in Corporations, by ſuch as be not free, by the like reaſon all men may uſe the Trade of Inn-keeping, unleſſe it could be brought

Reſolutions concerning Innes, and who may keep an Inne, and how they may be ſuppreſſed.

1 Bulstr. 109. brought to be within the Statute of 2 E. 6. which hath never been taken to be subject to that Statute in point of license: And vide that an Hostler is chargeable to the party which is his Guest, for the restoring of that which is lost in his House, and that by the Common Law of the Realm, vide H. 4. fol. 45. see also, 11 H. 4. fol. 47. That in an action upon the case brought by the School-master of Gloucester, for erecting any School to his prejudice, adjudged that no action lies; and there it is said, that if I have a Mill, and another erect another Mill, by which I lose my Custom, no action lies unlesse he disturb the water. And it was said by the chief Justice, that it was so resolved by the Judges, and that Justice Doderidge, Justice Haughton, and Justice Chamberlain were of the same opinion, and so now was my Brother Crew, the Kings Serjeant, who went the Circuit of Surrey, Kent, and Essex; but the chief Baron Tanfield was of a contrary opinion: And it seemed to him that Innes were licensed at first, and Originally by the Justices in Eire; but nothing could be shewn to that purpose: But all the Justices were of a contrary opinion, and said, that that was the ground that begot the Patent and Commission to Mounperson, viz. That the King might licence them, if the Judges might.

Inns not licensed.

And it was said by the Lord chief Justice, that there was not any such thing in the Eires; but because that strangers which were Aliens were abused and evilly intreated in the Inns, it was (upon complaint thereof) provided that they should be well lodged, and Inns were assigned to them by the Justices in Eire.

The second question was, if an Inn be erected in a remote and inconvenient place, so that it is dangerous to Travellers, and there harbour men of bad fame, which are apt to commit Robbery, whether that might be suppressed: And as to that all agreed that it is a common Nusance, and may be suppressed, and that to be by Indictment and presentment, to which the party may have his Traverse.

Suppressed as Nuians.

The third question was; whether when one which had erected an Inn be a man of bad behaviour, and such a person as is not fit to keep an Inn, how it should be aided and helped: And it was agreed by all, that upon Indictment or presentment thereof he may have his Traverse, and if he be convicted, then to be suppressed, viz. that he which had so misdemeaned himself, should not keep it as an Inn, nor use it: But that it being an Inn, it may be used afterwards by another.

Inn-keeper Suppressed.

Fourthly, how and by what way or means the multitude of Inns might be prevented, by being suppressed, or redressed upon complaint, or how the number might be stinted. This Point seemed to be difficult, and to contradict the resolution upon the first question: And therefore it was agreed that they should advise concerning it; and the best way is, that they be strictly injoyned to keep the Assise, and not to suffer any to tipple in their Inns; and by this way they would desist from their Trade. Vide Dalton fol. 31. the Edition printed 1635.

Mich.

Mich. 4 Car.

Mackerney *verſus* Ewrin.

RIchard Mackerney brought an action upon the caſe againſt Jeffrey Ewrin, and count, That whereas one I. S. was indebted to the Plaintiff in ſeven pounds four ſhillings for paſture, feeding, and oats for an Horſe kept in the Stable of the Plaintiff: The Defendant in conſideration that the Plaintiff at his requeſt would deliver the Horſe to him, to the uſe of the ſaid John S. promiſed to pay the ſaid ſeven pounds four ſhillings. And upon Non Aſſumpſit pleaded, and Verdict for the Plaintiff, Serjeant Callis moved in Arreſt of Judgment, that it is no good conſideration, for the Plaintiff had not any property in the Horſe, and he is not to do any other thing then the Law injoyn him to do: As if I loſe my goods and another find them, and in conſideration that he will deliver them to me, I promiſe to pay him two hundred pounds, that is not ſufficient matter to ground an Aſſumpſit thereupon: But if a Taylor had made a Sute of Apparel for I. S. and I. D. requeſt him to deliver it to him, and he will pay for the making thereof, that is a good conſideration, vide Coke lib. 8. fol. 147. And in this caſe all the Court were of opinion, That the conſideration was good, for whereas he might have detained the Horſe until he had been paid for the paſture and feeding, he at the ſpecial requeſt of the Defendant had delivered the Horſe to him, to the uſe of the Owner, which is to the prejudice of the Plaintiff, and a benefit to him to whoſe uſe he was delivered.

Caſe.

Conſideration in an *Aſſumpſit*.

To deliver another mans horſe to pay for his meat.

And Juſtice Harvey vouched a caſe which was in this Court adjudged, which was in conſideration that the Plaintiff had promiſed to pay to the Defendant ten pounds at a day, according to the Condition of an Obligation, the Defendant promiſed to deliver the Obligation, and adjudged a good Conſideration.

To deliver a Bond out. Devant 76.

Turner *verſus* Hodges.

THe Cuſtom of the Manor of is found to be for the Copyholders (without the Licenſe of the Lord of the Manor) they being ſeiſed in Fee, may make any Leaſe for a year, or many years, and when they dye, that the tearm ſhall ceaſe, and that the Heir or Heirs may enter.

Cuſtom in a Manor to make a Leaſe for years by Copyholders in Fee. Vide 1 Cro. 234. Popham 188.

It was moved in Arreſt of Judgment, that this was a bad cuſtom, and that the Copyholders had by cuſtom an Inheritance, and might by the general Cuſtom of the Realm make a Leaſe for one year; And that is not the general cuſtom of the Realm, but the cuſtom of every Manor within the Realm, vide Coke lib. 4. fol. 26. in Melwiches caſe.

Cuſtom creates the Eſtate, and the cuſtom is as ancient as the Eſtate, and is caſual, and upon the act of God, and is reaſonable, that the Heir who is to pay the Fine ſhould have the Poſſeſſion: And yet a Cuſtom, that if the Copyholder had ſurrendred to the Lord, that the Leaſe ſhould be void, had been a bad Cuſtom, becauſe that he

might ſubvert and deſtroy by his own act that Eſtate that he himſelf had made, and he which took the Leaſe having notice of the Cuſtom, takes the Leaſe at his peril, for otherwiſe he might have procured the Licenſe of the Lord; and then by this Licenſe the Lord had diſpenced therewith, and that is, as it were, the Confirmation of the Lord: For if a Copyholder makes a Leaſe for twenty years, with the Licenſe of the Lord, and after dies without Heirs, yet the Leaſe ſhall ſtand againſt the Lord by reaſon of his Licenſe, which amounts to a Confirmation. And the Plaintiff had Judgment.

Licenſe to leaſe a Confirmation.

Hil. 4 Car.

Leaſe by Baron and Feme without reſervation of any Rent.

EJectione firmæ was brought, and count upon a Leaſe made by Huſband and Wife, and that was by Indenture: And upon Not guilty pleaded, a ſpecial Verdict was given, in which the ſole queſtion was, Whether this Leaſe made by Baron and Feme was good, being there was no Rent reſerved thereby.

Good.

It was objected, that this Leaſe could not be made good by the Feme, by any acceptance, and therefore it is not the Leaſe of the Feme, no more then if the Verdict had found that the Leaſe was by an Infant, and no Rent reſerved, that had been a void Leaſe.

But it is contrary of a Baron and Feme, for the Baron had power, and the Feme joyning in the Leaſe, it is not void, for ſhe may affirm the Leaſe by bringing a Writ of Waſt, or ſhe may accept Fealty: And ſo was the opinion of the Court, and Judgment entred accordingly, vide Coke lib. 2. fol. 61. in Wiſcots caſe. Count of a Leaſe by Baron and Feme, and ſhew not that it was by Deed, and yet good, vide Dyer 91.

Paſch. 5 Car.

Paſton *verſus* Utber.

JOhn Paſton brought Ejectione firmæ againſt Barnard Utber, upon a Leaſe made by Mary Paſton: And upon Not guilty pleaded, a ſpecial Verdict was found at the Bar, and the Caſe was thus.

Cuſtom, that the Lord have a Field-courſe over the lands of his Copyholders; if the Tenant incloſe it is no forfeiture.

Barnard Utber ſeiſed of the ſaid Land to him and his Heirs by Copy of Court-Roll, according to the Cuſtom of the Mannor of Winham: And that within that Mannor there is ſuch a Cuſtom, that the Lord had had one field courſe for five hundred Ewes in the North-field, and the Weſt-field (whereof theſe fifteen acres were parcel) from the Feaſt of St. Michael, if the Corn were inned, and if it were not, then after the Corn were inned, until the Feaſt of the Annunciation, if it were not before that time ſown again with Corn, in all the Lands of the Copyholders not incloſed. And that it is a Cuſtom, that no Copyholder may incloſe any Copyhold Land without the Licenſe of the Lord: And if any be incloſed without Licenſe, then a reaſonable fine ſhould be aſſeſſed by the Lord or his Steward, for the Incloſure, if the Lord would accept thereof. And it is alſo a Cuſtom that if the Lord will not accept thereof, then the Copyholder which ſo incloſeth, ſhall be puniſhed at every Court after, until he open that Incloſure. And the ſaid Utber incloſed the 15. acres with an Hedge and Fence of Quick-ſet, 3 feet deep, and 6 feet

6 feet broad; and that he had left 4. ſpaces of 9. feet broad in the ſaid 15. acres: And that the ſaid **Utber** was required by the Steward to lay open the ſaid Incloſure, and he did it not, whereupon there was a command to the Bailiff to ſeiſe them as forfeit, which was done; And the ſaid **Mary** being Seignoreſs of the Mannor, entred, and leaſed to the Plaintiff, and the Defendant entred upon him.

Serjeant Davenport argued that it is a forfeiture, and againſt the Cuſtom which creates the Feildage for the Lord, as well as the Eſtate of Copphold for the Tenant, and that this leaving of four ſpaces is a fraud and device; and that it is againſt his Fealty, and is to the damage of the Lord, and a thing unlawful, vide Dyer 245. 34 E. 1. Formedon 88. 15 A. 7. 10. 29 E. 3. 6. That if the Tenant incloſe, the Commoner may break his Hedges. And though by Littleton an Incloſure which is a Diſſeiſin, is a total Incloſure, whereby he which hath the rent cannot come to diſtrain, yet this alſo is an Incloſure, becauſe that it obſtructs the field-courſe, for they cannot come ſo freely, without interruption or damage, for the Hedges may deprive the Sheep of their wooll: And he compared it to the caſe of 3 H. 7. 4. One is obliged to make an Eſtate of his Mannor of Dale, if he alien part and then make a Feoffment, the Condition is broken, and vide 5 E. 3. fol. 58. a Recognizance with Condition to make a Feoffment to I. S. of the Mannor, if he alien part thereof, he forfeit his Recognizance, he vouched 42 E. 2. 5. and Coke lib. 4. that denial of Services, or making of Waſt is a forfeiture, 22 H. 6. 18. 41 E. 3. Waſt 82. Dyer 364. And though that the Lord may proceed by fine to enforce him to lay it open, yet theſe Affirmative Cuſtoms do not toll the Negative. And to prove that the Lord had an Inheritance therein, he vouched 14 E. 2. Fitz. Grant. 92. A Rent granted to one and his Heirs, out of the Mannor of Dale, which he hold of the Mannor of D. this is an Inheritance. And if this ſhall not be a forfeiture, then this Cuſtomary Inheritance, which the Lord had in the field-courſe, might be tolled at the will and pleaſure of the Copphoider. Serjeant *Hitcham* argued ſtrongly to the contrary. Firſt, That it is no Incloſure, becauſe that all is not incloſed. Secondly, The forfeiture of a Copphold is always by ſome thing done to the Copphold land it ſelf, but this is done (as it is ſuppoſed) to the field-courſe of the Lord, which is not Copphold, and it is better for the Copphold, and makes the land better, and alſo the Field-courſe is thereby made better, and more beneficial to the Lord; and therefore the Copphold land is not altered, but is meliorated, and it is like to the caſe in Dyer 361. Althams caſe, after no Waſt done, the Evidence was, that a Trench was made in a Meadow, by which the Meadow was Meliorated, and adjudged no waſt, which might be given in evidence: But he ſaid, that in Brooks caſe, at the firſt coming of Popham to be chief Juſtice, it was adjudged, that if a Copphoider build a new Houſe, it is a forfeiture, for that altereth the nature of the thing, and put the Lord to more charge. So if Tenant for years makes a Hop-yard in the land, that is waſt. He ſaid, that this Cuſtom is qualified by taking a Fine, if he would, or by impoſing a pain in the Court, to enforce the Defendant to lay it open. And all the Court were of opinion, that this is no forfeiture, for the reaſons before; and that this Field-courſe is a thing which commence by agreement, and is but a Covenant, and not of common right: And Forfeitures (which are odious in Law) ſhall be taken ſtrictly,

Forfeitures of Copyholds.

Trin.

Trin. 5 Jac.

Starkey *verſus* Tayler.

Caſe. Words. 1 Croke 192.

STarkey an Attorney of this Court, brought an action upon the caſe againſt one Mr. Tayler of Lincolns Inn, for ſaying of theſe words to him; Thou art a common Barretor, and a Judas, and a Promoter. And it was moved in arreſt of Judgment, That theſe words maintain not action, for the generality, and uncertainty, that he ſhall be called a common Barretor.

And the chief Juſtice ſeemed to be of opinion, that theſe words are not more, then if he had ſaid, That he was a common Brabler or Quarreller. But it was urged by Serjeant Hitcham that the action lies, and that it is a general Rule, Quod ſermo relatur ad perſonam; as in Brichley's caſe, He is a corrupt man; and in Mores caſe, it was ſaid of an Attorney, That he was a couſening Knave: And if theſe words were ſpoken of a common perſon, he doubted if they were actionable, but being ſpoken of an Attorney, action lies. And if theſe words were ſpoken of a Judge, without doubt they were actionable: And in this caſe being ſpoken of an Attorney, who is a Miniſter of Juſtice, and who hath the Cauſes of his Clients in his hands, to gain them, or to loſe them. The Statute of Weſtminſter 1. C. 33. ſays, the Sheriffs are charged to expel all Barretors out of their Counties: And in the Statute of 34 E. 3. is the deſcription of a common Barretor, and his puniſhment, who is a ſtirrer of falſe and unjuſt Suits, and that he ſhall be impriſoned during the pleaſure of the King, bound to his good behaviour, and fined. And Littleton in his Chapter of Warranties ſaith, They are hired to keep Poſſeſſions, and therefore an action lies. But to ſay of another man, That he is a common Barretor, is not actionable, unleſs he ſaith, that he is convicted.

Barretor.

Hil. 3 Car. Rot. 1302.

Watt *verſus* Maydewell.

Leiceſt.

Where acceptance of a new Leaſe for years, makes a ſurrender of the former. Vide ant. 7, 8.

WIlliam Watt brought an Ejectione firmæ againſt Laurence Maydewell, upon a Leaſe made by Robert Rome, upon Not guilty, and a ſpecial Verdict found, the Caſe was thus.

Francis Griffith ſeiſed of Land in Fee, by Indenture, bearing date the fourteenth of November, and 14 Jac. demiſed the ſaid Land whereof, &c. for one and forty years, to Robert Rome, rendring two ſhillings Rent, to commence from the Annunciation which ſhall be An. 1619. and after the ſame year by another Indenture, bearing date the third of December, 15 Jac. to commence from the Annunciation laſt, demiſed the ſame Lands for ninety nine years to Dame Frances Perpoint, who entred and was thereof poſſeſſed; And after that, the ſaid Francis Griffith by another Indenture the ſame year, bearing date the fourteenth day of November, 16 Jac. to commence from the ſeventeenth of November, An. 1619. demiſed it to the ſaid Robert Rome, for one and forty years,

years, who accepted it, and afterwards entred, and being poſſeſſed made his Will, and appointed Executors, and died, the Executors adminiſtred, and made the Leaſe to the Plaintiff, who was poſſeſſed, until he was ouſted by the Defendant.

And the only queſtion of this Caſe was, if the acceptance of the ſecond Leaſe by Robert Rome, had determined, diſcharged or extinguiſhed the former Leaſe.

And after Argument it was adjudged for the Plaintiff, the reaſon was, becauſe that by the Leaſe made to the Lady Perpoint for ninety nine years, and her Entry, Francis Griffith had but a Reverſion, and could not by his Contract made afterwards with Robert Rome, give any Intereſt to Robert Rome. This Leaſe made to Robert Rome, viz. his former Leaſe was good in Intereſt, being to commence at a day to come, and is grantable over; and may be ſurrendred or determined by matter in Law before the Commencement thereof, as if he take a new Leaſe to commence preſently, which ſee in 37 *H.*6.29. 22 E.4. for it inures in Contract. Contract. Power implied.

And in this caſe it had been without queſtion, that the taking of the new Leaſe had been a ſurrender of the former, if it were not by reaſon of the Leaſe for ninety nine years, which is for ſo great a number of years, that diſables him to contract for one and forty years, 37 *H.*6.17. 18. 14 *H.*7.3. Dyer 140. Vide Smith and Stapletons caſe in Plowden, If a man makes a Leaſe for one and twenty years, and after makes a Leaſe for one and twenty years by Parol, that is meerly void; but if the ſecond Leaſe had been by Deed, and he had procured the former Leſſee to Attorn, he ſhall have the Reverſion, vide Ive's caſe, Coke lib. 5. fol. 11. there it is adjudged that the acceptance of a Leaſe for years, to commence at a day to come is a preſent ſurrender of a former Leaſe. Surrenders in Law of Leaſes.

Theſe Caſes were vouched in this Caſe. Serjeant Bakers caſe in the Court of Wards, with the Lady Willoughby, that a latter Leaſe taken by him which was void, did not ſurrender his former Leaſe which was good.

Sir Rowland Heywards caſe, the Leſſee had election to take as a Leaſe, or as a Bargain and Sale, and that it is not by way of Eſtoppel, becauſe it was contracted out of the Reverſion. *Baker* and *Willoughby.* Dyer 103, 280. vid. 1 Inſt. 57.

Trin. 14 Jac. Rot. 3308. Thompſon againſt Green, adjudged that when one grants Proximam Advocationem to one, and after grants Proximam Advocationem to another, this is meerly void. *Mello* and *Mayns* caſe. Tr. 43 Eliz: contr. *Thompſon* and *Green.*

38 Eliz. Rot. 1428. Ejectione firm' brought by Mills againſt Whitewood, adjudged that where Leſſee for years takes a new Leaſe after the death of his Leſſor, of the Gardian in Socage, this is no ſurrender of his Leaſe. *Mills* and *Whitwood.*

42 Eliz. Rot 105. In Sir Arthur Capels caſe, adjudged. Rud, who was Leſſee for ſixty years of an Advowſon, when the Church was void, took a Preſentation to himſelf of the Leſſor, and is admitted and inducted, this was a Surrender of his Leaſe.

Mich. 5 Car.

Baker *verſus* Johnſon.

In a Recovery, if the Town be omited, the Land do not paſs.

A Jury was at the Bar in an Ejectione firmæ brought by Henry Baker againſt Bartholemew Johnſon, upon a Leaſe made by James Baker, which was ſeiſed of two Marſhes among others called Knightſwick and Southwick, which lie in an Iſland called Camby, in the Pariſh there called North-Benfleet: And he being Tenant in tail, and intending to dock it, and to make himſelf ſeiſed in Fee, by Indenture, the 10th of Eliz. Covenanted to ſuffer a recovery of theſe two Marſhes by name, and of many other Lands, and that it ſhould be to the uſe of himſelf in Fee; and the recovery was had, and therein South-Benfleet and many other Pariſhes named, and Camby, but the Pariſh of North-Benfleet was omitted: And if the Lands in North-Benfleet paſſed or no, was the Queſtion.

Lieu Conus, where ſufficient in Common Recovery or not.

And it was ſtrongly argued by Crew and Henden to have it found ſpecially, it being in a Common Recovery, which is but a Common Conveyance. But all the Court agreed, that the Town and Pariſh being omitted, although that Camby was a place known (but it appeared that that extends in and to ten Towns) yet being in a Town, that the Recovery extends not thereto, no more than if one had a Manor in the Town of Dale, which Manor is called Bradford; and within the ſaid Manor is a place known which is called Braiſty Wood, and he omit the Manor and the Town, and ſay, the hundred acres of Land in Braiſty Wood, that is not good. And the Court agreed, that a Common Recovery is good in a Town, Pariſh, or Hamlet, and peradventure in a place known out of the Town, Pariſh, or Hamlet, as in the Foreſt of Inglewood, in Inſula de Thamete, &c. But if it ſhould be admitted that a Common Recovery ſhall be good in a place known in a Town or Hamlet, that ſhall be abſurd, for there is no Town, in which there are not twenty places known; and it had been adjudged, that a Venire facias de vicineto of a place known in a Town, without making the Viſne of the Town, is not good.

Town, Pariſh, Hamlet, good.

Venire fac. V. 1 Cro. 270, 276.

Mich. 5 Car.

Bill *verſus* Lake.

London.

Caſe.

Where the requeſt is the cauſe of action

Baron and Feme.

FRancis Bill brought an action upon the Caſe againſt Sir Arthur Lake, and counted, that whereas at the ſpecial inſtance of Lettice Wife of the Defendant, he had provided for the ſaid Lettice a Taffety Holl, the Defendant did aſſume to pay as much as it was worth upon requeſt. And ſo in like manner for providing of Linnen ſtuff, &c. and making of ſeveral Garments for the Wife, and aver that the ſeveral things bought amount to ſuch a ſum, and the making thereof was worth ſuch a ſum, which in toto, &c. and alledge the requeſt: And aver that they were neceſſary Veſtments, and convenient for the degree

of

of the Wife, and after the making of them, he had delivered them to the Wife.

The Defendant pleaded the Statute of 21 of King James for Limitation, and ſaid, that the Plaintiff within ſix years after the promiſe ſuppoſed, nor within three years after the end of the Parliament, had not proſecuted any Original, or any Action upon this promiſe and Aſſumpſion, whereunto the Plaintiff demurred.

And upon Argument at Bar by Serjeant Bramſton for the Plaintiff, and Davenport for the Defendant, the matter was reduced to this Queſtion.

Whether the cauſe of Action ſhall be founded upon the requeſt, or upon the promiſe. *Queſt.*

Bramſton agreed, that where it is founded upon an Aſſumpſit in Law, and that the requeſt is but for increaſe of Damages, and not iſſuable, there the Aſſumpſit is the cauſe of the Action. But this cannot be founded upon an Aſſumpſion in Law, becauſe that it is not certain, but to be made certain; firſt, by the Plaintiffs buying and providing of the Stuff: Secondly, by the Plaintiffs trimming and making thereof; and then the matter of promiſe is for the payment of ſo much money as it ſhould be reaſonably worth, and therefore the requeſt is there collateral, and then it is the cauſe of the action; and ſo within the Statute, if it be an action which is founded upon an Aſſumpſit in Law, then it doth not charge the Husband: ſee the difference when requeſt is material and ſhall be alledged, and when not, in Metholl and Pecks caſe before, and a Feme Covert is not capable to make any Contract, becauſe ſhe is Sub poteſtate viri: And though it be for neceſſaries of Diet and Apparel, that ſhall not charge the Husband: But an Infant is capable to make Contract for Diet and Apparel neceſſary. An. 25 Eliz. Sir William Alephs caſe was adjudged, that where an Infant had taken ſo much for his neceſſary Apparel and Diet which amounted to fifty pounds, which was paid by Sir William Aleph; And he took an Obligation with a penalty, adjudged that it did not bind him in regard of the forfeiture: And Dyer 234. Sir Nicholas Poines's caſe, the Wife took Sattin and Stuff to make her a Gown, and Sir Nicholas paid the Taylor for the making thereof: And yet upon an action of Debt brought againſt the Husband, it was reſolved that it did not charge him. Devant 73. Sir *William Alephs* caſe.

And that the requeſt is the cauſe of the action, he vouched Dyer 31. 18 E. 4. 4. ſolvend ſur requeſt, and 9 H. 7. fol. 22. Replevin, and Tenure for plowing the Land when he ſhall be required, he ought to alledge the requeſt; and he concluded with a Caſe adjudged, Hil. 4 Car. Rot. 716. Banco Regis, between Shueſouth and Fernell, an action upon the Caſe, and count, that the Defendant, An. 1618. had kept a Dog, which he knew had uſed to worry Sheep, and that the Dog had worried and killed divers Sheep of the Plaintiffs: And the Defendant in conſideration thereof promiſed to ſatisfie the Plaintiff what he was damnified when he ſhould be required thereto; and the promiſe was An. 18 Jac. and the requeſt and refuſal was within the time of ſix years, and it was adjudged for the Plaintiff, becauſe that the requeſt is the cauſe of the Action, for without it he could not have his action. *Shueſouth* and *Fernel.* 1 Croke 139.

And the ſole matter upon which Davenport inſiſted, was, that this was a Contract by the Husband, whereupon the Pl. might have an action of Debt againſt him, and then it is but an Aſſumpſit in Law, and the requeſt is not cauſe of action: And therefore he ſaid, as well as Debt Baron and Feme.

Debt lies upon the delivery of Cloth to a Taylor for the making Garments thereof; ſo an action of Debt lies for the ſum accompanying the ſpecial matter, viz. for the payment of ſo much as the making ſhall be reaſonably worth, vide Coke lib.4.fol.147. ſo Debt lies as well againſt the ſaid Sir Arthur, upon this promiſe being made then and there, he vouched 34 E.1. Fitz. Debt 167. vet.N.B.fol.62. 30 E.3.18,19. 27 *H.*8. Tatams caſe.

But the Court inclined, that no action of Debt lay againſt Sir Arthur upon this Aſſumpſit, but only an action of the caſe upon the requeſt.

Mich. 4 Car.

Treford *verſus* Holmes.

Caſe. *Aſſumpſit* in conſideration of forbearance.

TReford brought an action upon the Caſe againſt Holmes as Executor, and counted, that whereas the Teſtator was indebted to the Plaintiff, the Defendant in conſideration that the Plaintiff would forbear the ſaid Debt for a reaſonable time aſſumed to pay it: And this promiſe was made in December, and he ſhew forbearance until March next; And upon Non aſſumpſit pleaded, and Verdict for the Plaintiff, Serjeant Thinn moved in Arreſt of Judgment, that it is no ſufficient conſideration, for the incertainty of the time, if it had been for a little time it had not been good: But the Court adjudged it good, for the Court ought to judge of the time whether it be reaſonable, vide Iſaac Sidleys caſe before: Then he moved another Exception, which was, that he had not ſhewn and averred in the Count that the Defendant had Aſſets at the time of the promiſe, vide Coke lib. 9. fol. 93, & 94. Baines caſe, that ought to come on the other part, or otherwiſe it ſhall be upon Evidence, if it be neceſſary.

1 Croke 241. Executor.

Aſſets, when to be alleged. 1 Bulſtr 41.acc. devant.23.

And Judgment for the Plaintiff.

Mich. 5 Car.

A ſtrange increaſe of Water in Weſtminſter-Hall.

MEmorand. That on Friday the twenty third day of October, by reaſon of the greatneſs of the Spring-tide, and a great Flood, the Hall of Weſtminſter was ſo full of water, that neither the Serjeants could come to the Bar, nor any ſtand in the Hall, for there was a Boat that rowed up and down there, and therefore all that was done, my Brother Harvy went to the Stairs which came out of the Exchequer, and rode to the Treaſury, and by this way went and ſet in the Court, and Adjourned all the Juries, for it was the fourth day del tres Mich. And after that we were in the Exchequer Chamber, and heard four or five motions of the Prothonotaries there.

Weſtminſter-Hall overflown.

Adjornment.

This coming into Court was not of neceſſity, unleſs it had been the Eſſoin day, or that the Court ſhould be Adjourned, as Craſt. Animar.

The Chancery and Kings Bench ſate, for they came by the Court of Wards.

Hil.

Mich. 5 Car.

Freeman *verſus* Stacy.

BEtwen Freeman and Stacy, upon a ſpecial Verdict the Caſe was; The Plaintiff count upon a Leaſe by Indenture for one and twenty years, rendring rent, and in debt for the arrearages of this rent; it appears, that the arrearages of the rent for which the action was brought, were due ſix years and more before the action brought.

Arrearages of Rent reſerved by Indenture is not within the act of 21 *Jac.* of Limitations. cap. 16.

And the Lord Richardſon was of opinion, that Judgment ſhould be given againſt the Plaintiff, becauſe the Statute of the 21. of King James, cap. 16. extends to Debts for arrearages of Rent expreſly.

But I, and my Brother Harvey, and Brother Yelverton concurred, that this action of Debt being upon a Leaſe by Indenture, is not limited to any time by this Statute, but is out of it, and ſhall be brought as before the making of this Statute. The words are, All actions of debt, grounded upon any lending or contract without ſpecialty: All actions of debt for arrearages of Rent, &c. And this is an action upon a contract by ſpecialty, 4 H. 6. 31. he ought to declare upon the Indenture, and it is a contract, viz. a Leaſe: And there is cauſe of uſing the Indenture every half year. And it was reſembled to the caſe upon the Statute of 32 H. 8. of Limitation, a Rent-charge which is founded upon a Deed or a Reſervation of a Rent upon a Fee-ſimple by Deed, are not within the Statute of Limitation. And nothing in this Statute was intended to be limited, which was founded upon a Deed: And the words, Debt for arrearages of Rent, are ſupplied and ſatisfied by the arrearages of Rent upon a Demiſe without Deed.

And as to the Objection, That the proof of payment might be wanting when the action is brought ſo long after the Rent became due, that might be objected to Debt upon an Obligation, where the day of payment is for a long time paſt.

And afterward the Lord Richardſon mutata opinione agreed with us; And Judgment was given for the Plaintiff.

Trin. 6 Car.

Shervin *verſus* Cartwright.

Rationabl. pars bonorum is not within the Statute of 21 *Jac.* of Limitations.

SHervin brought a Writ De rationabile parte bonorum againſt Cartwright, and counted of Cuſtom in the County of Nottingham, and ſhew all ſpecially, and the concluſion was, that he detaineth particular Goods of the party Plaintiff, which appertained to him as his part and portion: And upon Non detinet pleaded, it was found that the Plaintiff was intituled to this Action many years before the Statute of 21 Jac. and that he had not brought his action within the time limited by the ſaid Statute. And upon the ſpecial Verdict, the Caſe being argued by Serjeant Ward for the Plaintiff, it was adjudged for the Plaintiff.

First, because that this action is an Original Writ in the Register, and is not mentioned in the said Act, and though that the Issue is Non detinet, yet this is no action of Detinue, for a Writ of Detinue lies not for money, unless it be in bags, but Rationabile parte bonorum lies for money in Pecuniis numeratis, vide the Book of Entries, Rationabile parte bonorum: And this action lies not before the Debts be paid: And the Account was, that thereby it might be known for what it should be brought, and that in many cases requires longer time then the Statute gives.

Another reason was, That Statutes are not made to extend to those cases which seldom or never happen, as this case is, but to those that frequently happen.

Also this Statute tolls the Common Law, and shall not be extended to equity. And upon all these reasons the Court gave Judgment for the Plaintiff: And Serjeant Ward argued well, and vouched divers good Cases.

The Writ of Detinue supposeth property in the thing demanded, vide 50 E. 3. 6.

Cook *versus* Cook.

How a Writ of Wast shall be where there is a lease for life, remainder in fee.

William Cook alias Barker, brought an action of Wast against George Cook alias Barker, and count against him as Tenant for life, of the Lease of George Cook, and intitle himself to the Reversion, Ex assignatione of the said George, and shews that George Cook being seised in Fee, and held the said Lands in Socage, devised the Land to the Defendant for life, the remainer in tail to the Plaintiff: And upon the Count the Defendant demurred.

And the Question was how the Writ should be, where a Lease is made for life, the remainder in Fee, for it cannot be, Quod de ipso tenet; And it seems that the Writ shall be special upon the Case, as a Fine levied to one for life, the remainder in Fee, the Writ shall be special upon the Case: And it seems that it shall never be Ex assignatione, but where the Reversion is granted over, vide 38 E. 3. fol. 23. the direct Case: and vide 38 H. 6. fol. 30. in the Writ of Consimili casu, vide F. N. B. fol. 207. in the Writ of Consimili casu, qui illud tenet ad vitam D. ex Assignatione prædicti B. quam I. filius & hæres R. qui quidem R. illud præfat. D. demisit ad eundem terminum, inde fecit præfat. B. &c.

Dyer 206. b.

The Estate for life with a Remainder over, is but one Estate, and it was a question at Common Law, if he in remainder shall have an action of Wast, vide 41 E. 3. 16. 42 E. 3. 19. 50 E. 3. 3. Reg. 75.

But at this day the Law is clear, That he in remainder shall have an action of Wast, F. N. B. fol. 207. but these Books prove that the Writ of Wast ought to be Ex dimisione, non ex assignatione.

Mich. 6 Car.

Case, Words. Theft.

AN action of the case was brought for these words, Thou art a Thief, and hast stoln one Passions Lamb, and marked it and denied it: And upon Not guilty pleaded, and Verdict for the Plaintiff: Serjeant

Ashle

Aſhley moved in Arreſt of Judgment, becauſe that it is not ſhewn whoſe Lamb, for Paſſions is no word of any ſignification without the name of Baptiſm. And the Court was of opinion that the Count was good, for it had been ſufficient to call him Thief, and then the ſubſequent matter and words aggravate, and contain matter of Felony: And it is a general Rule, that when the firſt words are actionable, the latter words which tell the force thereof, ought to be ſuch as do not contain Felony.

Babbington *verſus* Wood.

BAbbington brought an action of debt againſt Wood, upon an Obligation of 600 l. the Condition was, That if Wood reſign a Benefice upon requeſt, that then the Obligation ſhould be void. And the Condition was entred; the Defendant demurred, and Judgment in Banco Regis pro querente, And upon Error brought, Judgment was affirmed in the Exchequer Chamber; for this Obligation is not voidable by the Statute of 14 Eliz. which makes Obligations of the ſame force, as Leaſes made by Parſons of their Gleabes, viz. per non reſidency; And it doth not appear by the Plea of the Defendant, that it was not an Obligation bona fide which might be lawful: As if a Patron which hath a Son, which is not yet fit to be preſented for default of age, and he preſent another with an agreement, that when his Son comes to the age of 24 years, he ſhall reſign it, it is a good Obligation. And this caſe, viz. an Obligation with Condition to reſign had been adjudged good in the caſe of one Jones, An. 8 Jac. And the Counſel ſaid, That he who is preſented to a Church is married thereto, and it is like as if a man who hath married a Wife, ſhould be bound to be divorced from her, or not cohabit with her, theſe Conditions are void. But theſe reſemble not our Caſe.

1 Croke 180.

A Condition to reſign a Benefice upon requeſt.

Noy 22 Contr.

Jones Caſe. Concil. Nicen. Can. 15.

Wilſon *verſus* Briggs.

WIlſon brought an action of Account againſt Briggs, as Baily of his Manner in the County of Cambr. and alſo as Baily to another Manner in the County of Suff. And this action was brought in the County of Camb. and found for the Plaintiff, & Judgment to account, and found in arrears, and Judgment given. And now the Defendant brought a Writ of Error, and Judgment was reverſed becauſe it was miſ-tried, for it ſhould be tried at the Bar by ſeveral Ven. fac. to be directed to the ſeveral Sheriffs. Firſt it is agreed, that a Writ of Account againſt one as Bailiff of his Manner, cannot be brought in another County, but only in that County where the land lies, vid. 8 E. 3. fol. 46. Fitz. acc. 93. ſee there that two actions of Account brought againſt one for receit in two Counties. And there it is ſaid, that it being upon a day, that he may have one writ, and count in the 2 Counties. But to that it is ſaid, that that proves not but that he might have two Writs whereby it might be awarded that he ſhould anſwer. But in this caſe it was reſolved, that it was a miſ-trial, for it ought to be by two Ven. fac. and tried at Bar, and it is not aided by the Statute of 21 Jac. cap. 13.

Trial of an Action of Account upon receit in two Counties.

Action local.

Trial at Bar. Miſ-trial.

Trin.

Trin. 8 Car.

Pernell *verſus* Bridge.

Hil. 6 Car. Rot. 1235.

Fine to two, and the heirs of one to the uſe of them two in fee.

HEnry Pernell brought Replevin againſt William Bridge, Robert Bridge, and two others: William Bridge plead Non cepit, and the other made Conuſance, and upon Demurrer the caſe was ſuch.

Richard Braken was ſeiſed in Fee of ſixty acres of arrable Land, and forty eight acres of Meadow and Paſture, whereof the place in which, &c. was parcel; And he the ſixth of Febr. An. 18 Eliz. by Deed granted an Annuity or Rent-charge of thirteen pounds ſix ſhillings out thereof, to Edward Steward in Fee, payable at the Feaſt of Saint Peter, or within eight and twenty days after: And if it be arrear for eight and twenty days after the ſaid Feaſt, that then he forfeit for every time after forty ſhillings, with a clauſe of Diſtreſs as well for the ſaid rent, as for the ſaid forty ſhillings, if it ſhall be arrear.

Edward Steward ſeiſed of the rent died, whereby it diſcended to Joan Jermy Wife of Thomas Jermy, Daughter and Heir of the ſaid Edward Steward, and they being ſeiſed thereof in the right of the ſaid Joan, An. 41 Eliz. in Craſtino animarum levied a Fine of the ſaid rent to Robert Brook, and Iſaac Jermy, and to the heirs of Robert, which Fine was to the uſe of the ſaid Robert and Iſaac, and their heirs for ever: by force thereof, and of the Statute 27 H. 8. they were ſeiſed of the ſaid rent in Fee, and after the ſaid Robert died, and Iſaac ſurvived, and is yet ſeiſed *Per jus Accreſcendi*, and for rent arrear, &c. and for the ſaid forfeiture of forty ſhillings, they avow, whereupon the Plaintiff demur.

Jointenancy in uſe.

Vid. Dyer 186. 1 Cro. 231. 245 13 Rep. 55, 56.

And upon Conference between the Judges, they all agreed, that by this Fine to Brook and Jermy, and the Heirs of Brook, to the uſe of Brook and Jermy, and their Heirs, that they were in by the Statute of 27 H. 8. and were Jointenants of the Rent, for otherwiſe there would be ſuch a Fraction of the Eſtate, that Brook ſhould be in by the common Law, and Jermy by the Statute, and that is not according to the Statute: And it appears that the uſe was limited by the Fine it ſelf, and not by any Indenture.

And the principal reaſon is upon the Statute of 27 H. 8. which is, where two or three are ſeiſed to the uſe of one or two of them, Ceſtui que uſe ſhall be adjudged to have ſuch Eſtate in poſſeſſion, as they have in uſe. Judgment pro Defendent.

Common Recovery.

Filing of a Writ of Entry many Terms after.

Memorand. That in this Term a motion was made for the filing of a Writ of Entry in a Common Recovery ſuffered by Sir John Smith upon a Purchaſe, and all was well done, and the Writ made and ſealed, but by the negligence of the Attorney it was not filed; and it was Unanimo aſſenſu reſolved that it ſhould be filed, and that after the death of Sir John Smith, for it is but to perfect a Common Recovery which is a common Conveyance: And this was denied in the caſe of one

one Allonſon, for there Error was brought and Diminution alledged; and a Certificate that there was no Writ by the Cuſtos brevium.

And it is ordinary to file theſe Writs at any time within a year, without motion.

Mich. 8 Car.

Harbert *verſus* Angell.

CHarles Harbart Plaintiff, againſt Angell, in an action upon the caſe for words, which were, Thou art a Thief, and haſt couſened my Coſin Baldwin of his Land: And after the Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the words would not maintain an action. Caſe. Words. Theft.

And at the firſt, Juſtice Crawley and Juſtice Vernon were of opinion, that the former part of the words were actionable, and that they were not extenuated by the ſubſequent words; but they agreed, if it had been, for thou haſt robbed, &c. it would be otherwiſe. And the Lord Heath and Juſtice Hutton were of a contrary opinion, and that the words And, and For, are in this caſe to have one effect: and declare what Thief he intended: And they relyed on Birtridges caſe, Coke lib. 4. And upon this diverſity of opinion the Lord Heath conferred with the Juſtices of Serjeants Inn in Fleetſtreet, and we with the Lord Richardſon, and they all agreed, that the ſubſequent words explained his intent and meaning, viz. the Robbery and couſening of the Land: And Verba ſunt accipienda in mitiori ſenſu; As to ſay, Thou haſt ſtoln my Corn, it ſhall be intended Corn growing: ſo in Arrowes caſe, 19 Jac. Thou art a Thief, and haſt ſtoln ten Cart-loads of my Furzes, adjudged not actionable, for it ſhall be intended of Furzes growing. *Arrowes* caſe,

Querens nil capiat per breve.

Ram *verſus* Lamley.

Norff.

RAm brought an action upon the caſe againſt Lamley, and declared, That whereas he was Bonus & legalis homo and free a ſuſpitione feloniæ, the Defendant maliciouſly went to the Major of Linn, and requeſted a Warrant of him (being a Juſtice of Peace) againſt the Plaintiff for ſtealing his Ropes: The Major ſaid to him, Be adviſed and look what you do, the Defendant ſaid to the Major, Sir, I will charge him with flat Felony for ſtealing my Ropes form my Shop, *Quorum quidem verborum, &c.* And after Not guilty pleaded, and Verdict for the Plaintiff, Hitcham moved in Arreſt of Judgment; And the Court unanimouſly reſolved that theſe words being ſpoken to the Juſtice of Peace when he came for his Warrant, which was lawfull, would not maintain an action, for if they ſhould, no other would come to a Juſtice to make complaint, and to inform him of any Felony. Words. Spoken before a Juſt. Peace.

Querens nil capiat per breve.

Mich. 8 Car.

Lamb *verſus* West.

Trin. 8 Car. Rot. 333.

Replevin. SIr John Lamb knight, brought Replevin againſt Thomas West, and count, that the Defendant took his Beaſts at Bliſworth, in quodam loco vocat. Thorny Cloſe.

The Defendant made cognizance as Bayliff to Sir William Sheapherd, and derived Title by a Leaſe to Michael West for ninety years, if he and Thomas West the Defendant, and one Hutton West ſhould ſo long live: And the ſaid Michael, 19 Aprilis, An. 20 Jac. granted a Rent-charge of ten pounds per annum to the ſaid William Shepherd and his Executors, out of the place in which, &c. for the reſidue of his Tearm, to be paid at the houſe of Thomas West in S. And the ſaid Mich. agreed, that if the Rent be arrear by eight and twenty daies, being lawfully demanded at the ſaid houſe, he ſhould forfeit twenty ſhillings for every day that it ſhould be arrear, and if it be arrear by ſix months, being lawfully demanded at the ſaid houſe, then he might diſtrain for that, and the Nomine pœnæ: And for Rent arrear by a year after demand due, &c. he makes Conuzance; And thereupon the Plaintiff demurred generally.

Rent-charge.

And after many Arguments at Bar, the Juſtices delivered ſhortly their opinions ſeverally, and all agreed that it is a Rent-charge: and then a Diſtreſſe is incident to a Rent-charge, which is in its creation a Rent-charge, as well as if one makes a Leaſe for like or years, rendring Rent, and if it be lawfully demanded, then it ſhall be lawfull to diſtrain for it. None will deny, but that he may diſtrain for this Rent, without any demand: And the diverſity is between a Penalty and a Rent, for if the Avowry had been for any part of the Nomine pœnæ, then without actuall demand at the day he could not have diſtrained therefore, vide Maunds caſe Coke lib. 7. fol 28. And all agreed, that when a Diſtreſſe is for Homage, if it be once tendred and refuſed, he cannot diſtrain without demand, vide Litt. 34. 21 E. 4. 6. 16, 17. 7 E. 4. 4. That where a Rent is reſerved upon a Leaſe, and an Obligation to pay it, yet that alters not the nature of the Rent, 22 H. 6. a good caſe.

Demand when neceſſary.

For rent. V. devant. 23.

Rent is reſerved upon a Leaſe, and an Obligation to perform Covenants, that extends not to the Rent reſerved, but if it be to pay the Rent, then it ſhall be demanded, there it is ſaid, that if Rent be tendred and refuſed, the Lord or Leſſor may diſtrain without demand. It was agreed, that if Rent be tendred at the time of the Diſtreſſe, and it be refuſed, and a Diſtreſſe taken, that is Tortious, 30 Aſſ. 36. 20 H. 6. 31. 48 E. 3. 9. 2 H. 6. 4.

For *Nomini pœnæ.*

And in this caſe it was ſaid, that Reddenda ſingula ſingulis, that the demand ſhall be uſed when the Penalty of the Rent comes in queſtion, and not for the Rent. And though it be reſerved payable at another place that payeth not the Rent, but it is iſſuable out of the Land and diſtrainable upon the Lands.

And laſtly, it hath been divers times adjudged, that the Rent is payable

ble upon the Land, 1 Jac. Rot. 1818. In Replevin between Nich and Langford.

Nich and *Langford.*

Trin 16 Jac. Rot. 954 Between Skinner and Amery, vide before between Crawley and Kingſwell.

Skinner and *Amery.*

Trin. 3. Car. Rot. 2865. Rent reſerved payable out of the Land: And although that the Judgment is by confeſſion after demurrer, yet it was for the reaſon afore recited.

Borman and *Bower.*

Judgment for the Defendant.

The Lord Audley's Caſe.

Wilts.

JUratores pro Domino rege ſuper ſacramentum ſuum preſent. Quod Martinus Dominus Audley nuper de Fountell Gifford in Comitatu Wilts. & Ægideus Broadway de Fountell Gifford prædict. in Comitatu prædicto generoſus. timorem Dei præ oculis ſuis non habentes, ſed Inſtigatione Diabolica moti & ſeducti viceſſimo die Junii, Anno regni Domini noſtri Caroli Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, fidei defenſoris ſexto, Apud Fountell Gifford prædict. & Comitatu prædicto vi & armis, &c. in & ſuper Annam Dominam Audley Uxorem præfati Domini Martini Audley in pace Dei, & dicti Domini Regis ibidem Exiſtent. inſult. fecerunt. Et prædictus Ægidius Br. prædictam Annam Dominam Audley vi & armis, contra voluntatem ipſius Annæ ad tunc & ibidem violenter & felonice rapuit, ac ipſam Annam ad tunc & ibidem contra voluntatem ſuam violenter & felonice carnaliter cognovit, contra pacem Domini Regis nunc coron. & dignitat. ſuas & contra formam ſtatuti in hujuſmodi caſu edit. & proviſ.

Indictment for Rape.

Et ultra Juratores prædicti dicunt ſuper ſacramentum ſuum prædict. Quod prædictus Martinus Dominus Audley prædicto viceſimo die Junii, An. ſexto ſupradicto Apud Fountell Gifford prædictam, in Comitatu prædicto felonice fuit preſens, auxilians & Confortans, abettans, procurans, adjuvans, & manutenens Prædictum Egidium Br. ad feloniam prædictam in forma prædicta felonice faciend. & perpetrand. contra pacem dicti Domini Regis nunc Coronam & dignitatem ſuas, ac contra formam ſtatuti prædicti.

Acceſſary to the Rape of his owne Wife.

Wilts.

JUratores pro Domino Rege ſuper ſacramentum ſuum preſent. Quod Martinus Dominus Audley nuper de Fountell Gifford in Comitatu Wilts. Deum præ oculis non habens, nec naturæ ordinem reſpiciens, ſed inſtigatione Diabolica motus & ſeductus primo die Junii, An. Regni Domini noſtri Caroli, &c. ſexto, Apud Fountell Gifford prædictam in dicto Comitatu Wilts. in domo Manſionali ejuſdem Martini Domini Audley, ibidem vi & armis in quendam Florence Fitz-patrick Yeoman inſult. fecit & cum eodem Florence F. ad tunc & ibidem nequit', Diabolice, felonice & contra naturam rem veneream habuit, ipſumque F. ad tunc & ibidem carnaliter cognovit, peccatumque illud Sodomiticum deteſtabile, & abominandum, Anglice vocat. Buggery (inter Chriſtianos non nominandum) ad tunc & ibidem cum eodem Florence F. nequit. Diabolice. felonice & contra naturam Commiſit & perpetravit in magnam Dei Omnipotentis diſplicantiam, ac totius humani generis dedecus, ac contra pacem dicti Dom. Reg. nunc Coronam & dignitat' ſuas, &

Indictment for Buggery.

& contra formam ſtatuti in hujuſmodi caſu edit. & proviſ.

The like Indictment for the ſame Offence, with the ſame perſon, 10 June, the ſame year at new Sarum, in the Manſion houſe of the ſaid Martin, &c.

Memorand. That theſe Indictments were found 6 April, An. 7 Car. at new Sarum, by vertue of a Commiſſion before Edward Lord Gorges, Nich. Hide knight, chief Juſtice ad placita, &c. Thomas Richardſon chief Juſtice de Banco. John Denham knight, one of the Barons, &c. Edward Hungerford knight. Walter Vaughan knight, Laurence Hide knight, Thomas Fanſhaw knight, by Letters Patents, Ipſius Domini Regis pro eis & quibuſcunque tribus vel pluribus eorum inde Conject. ad Inquirendum, &c.

Tryall of a Peer. V. apres 131.

Memorand. That the 25. day of April, An. 7 Car. A Commiſſion was made for the Arraignment of the ſaid Lord Audley upon the ſaid ſeverall Indictments, by his Peers, in which the Lord Coventry, Lord Keeper of the Great Seal, was made high Steward: And the Peers were in number twenty ſeven: And he pleaded Not guilty: And one queſtion was propounded to the Judges which did attend, viz. The Lord chief Juſtice of the Kings Bench, the Lord chief Juſtice of the Common Pleas, the Lord chief Baron, Baron Denham, Juſtice Jones, Juſtice Witlock Juſtice Harvey, and Juſtice Crook.

If the Wife might be produced as a Witneſſe againſt her Husband.

Where a Wife may give Evidence againſt her Husband.

And it was reſolved that in caſe of a common perſon, between party and party ſhe could not, according to the opinion in Cokes firſt Inſtitutes, fol. 6. but between the King and the party, upon an Indictment ſhe may, although it concerns the Feme her ſelf, as ſhe may have the Peace againſt her Husband.

Buggery *ſans* Penetration.

V. 1 Croke. 332. 12 Rep. 37.

Hutton 116.

Alſo it was reported to the Lords, by the Lord chief Juſtice, (when they were demanded, whether this matter of Fact being as it was proved) that Pollution and uſing of a man upon his Belly Sodomitically, without penetration, was Buggery by the Statute of 25 H. 8. the Lord Richardſon was of a contrary opinion upon the Conference, yet his opinion was involved in the generall.

But as he ſaid to me, their opinions were delivered only upon this caſe and upon theſe examinations, if the Lords gave credit to the matter in fact, that it was Buggery, but they gave not a generall opinion, that may be a rule in other caſes, but upon the foulneſſe and abominableneſſe of this Fact.

Iudges opinion as to matter of Law. No ſpecial Verdict in tryal per Peers.

And afterwards the Lords were not unanimouſly reſolved that it was Buggery, but this Point was reſolved, that they ought to believe and give credit to the Law, as the Judges had declared it. And it ſeems that they could not give a ſpeciall Verdict upon this tryall, for it never was ſeen: Alſo the Commiſſion determines after Judgment given, And the Staff of the high Steward ſhall be broken.

And after long debate, they Seriatim (laying their hands upon their hearts, as the Manner is) ſaid, that he was guilty of Rape, beſide the Lord North.

And for the Buggeries twelve of the Lords acquitted him, and fifteen found him guilty, and ſo he had Judgment.

And at this Arraignment the Judges aſſiſtant ſat with their heads covered

covered, as the ancient uſe hath been; But the Serjeant at Arms was commanded to make Proclamation, That the Judges, and all the Lords (not being his Peers) and all of the Privy Council ſhould be covered, and others not. And this was only in relation to the precedent uſage, and the right which appertain to the Judges: For in Parliament, they being called by Writ, uſe to be covered as oft as the Lord Chancellor, or Keeper of the Great Seal (which is Speaker) puts on his Hat; But now it is uſed, that they put not on their Caps, until they have been requeſted by the Lord Speaker. And when they are called into the Star Chamber, or to Errors in the Exchequer Chamber, they ſit covered with their Caps.

Judges ſit covered When.

Paſch 7 Car.
Riſam *verſus* Goodwin.
Mich. 5 Car. Rot. 2512.

IN a Writ of Scire facias brought by William Riſam againſt John Goodwin and Richard Peat, Adminiſtrators of Thomas Cammon, the Caſe was ſuch.

The now Plaintiff William Riſam recovered againſt Thomas Cammon a hundred pounds Debt, and ten ſhillings Coſts, at the Grand Seſſions holden at Carmarthen, and Execution awarded, and *Nulla bona* returned. And upon Surmiſe that the ſaid Thomas Cammon was dead, and that the now Defendants had taken Letters of Adminiſtration, a Scire facias iſſued againſt them, and Nihil returned, and after a Writ of Execution, and that afterwards being returned by the Sheriff of the County *Nulla bona teſtatoris*, a Writ iſſued to the Sheriff of the County of the Town of Carmarthen, who returned Devaſtavit: And becauſe that the now Defendants had not Goods within the ſaid County, or within the County of the Town of Carmarthen, or Juriſdiction of the Grand Seſſions, the Plaintiff procured a Certiorari to the Juſtices of the Grand Seſſions, who certified the Record to the Chancery, and by Mittimus it came to the Common Bench, with directions *Quia executio judicii prædicti adhuc reſtat faciend'*, *Mandant quod*, at the Proſecution of the Plaintiff, *Vos fieri facias' de more*, *& ſecundum legem & conſuetudinem regni noſtri Angliæ fuit faciend'*. Whereupon a Writ of Scire facias was awarded to the Sheriff of Hereford againſt the ſaid Defendants, to which they appeared: And after many Imparlances they demurred upon the inſufficiency of the Writ of Scire facias.

The Court of Common Bench award not Execution upon a Judgment given in grand Seſſions in *Wales*.

And this caſe was argued by Berkley for the Plaintiff, and by Henden for the Defendant. And the Caſes put by Berkley were F.N.B. 243. a. b. 39 E. 6. 3 & 4 Aſſ. in ancient Demeſne, and for the Damages ſurmiſed, that he had nothing within ancient Demeſne, 21 E. 3. 49. 21 *H.* 7. 33. 8 Aſſ. 27. 30 H. 6, 7. 3 H. 4. 15. 1 Inſtitutes 59. in Frankalmoigne: That Wales is parcel of England, 1 E. 3. Juriſdiction 45. 22 H. 6. 58. 47 E. 3. 6. 3 E. 3. Quare Impedit 38. 35 H. 6. 30. 19 H. 6. 12. & 52. vide the Statute of 34 H. 8. for Wales, and Writs of Error.

Walli: Grand Seſſions. Note, In *Rice Gwin's* caſe Hill. 1655. B. R. adjudged, The Grand Seſſions is not ſuch an Inferiour Court, but ought to be taken notice of by the Courts of *Weſtminſter*.

Henden argued to the contrary; and his firſt reaſon was,

1. That this Court of the great Seſſions is an inferiour Court.
2. The Record it ſelf comes not, but a Tranſcript.
3. The Statute of 34 H. 8. hath appointed the Execution, and that ſhould be purſued.

4. This Innovation is perillous, and never put in practice. And he relied upon the diverſity. When Judgment in a peculiar inferiour Court, comes into the Kings Bench, or into this Court by Writ of Erroz, and is affirmed, then the Superiour ſupplies it, and adds ſtrength to the Judgment: But when Judgment is given in a Court of a Corporation, and that is removed by Certiorari, and ſent by Mittimus, that ſhall not be executed there, vide 45 E. 3. 25. Formedon in London, vide 14 E. 3. Trials 23. 15 E. 3. Record 35. New Book of Entries, the laſt caſe in Writ of Erroz, vide 8 E. 3. 10. 26 *H.* 6. 8. 3 *H.* 6. 16. 7 *H.* 4 8. 14 *H.* 4. 25 *H.* 5. 11. And he relied upon 21 *H.* 7. 35. and the caſe of 39 *H.* 6. 3, & 4. and the caſe of ancient Demeſne, 7 *H.* 9. 18. 37 *H.* 6. 16. Dyer 369.

Executions after removal.

And upon this Caſe the Judges conſulted and agreed, that the Writ was inſufficient: And ſo Judgment was given againſt the Plaintiff. But it was ſaid, that upon this Judgment ſo ſent to this Court, the Plaintiff might bring an action of Debt, and ſo have execution: But to make this Court an Inſtrument to ſerve an Inferiour Court, and to extend their Juriſdiction by this way, as it were by a Windlace, it is not lawful.

Hil. 7 Car.

Napper *verſus* Sanders.

Paſch. 6 Car. Rot. 1148.

IN an Ejectione firmæ brought by Robert Napper againſt Henry Sanders, upon a Leaſe by Deed Indenture, made by John Napper and Elizabeth his Wife, and Francis Sanders, upon Not guilty pleaded, the Jury gave a ſpecial Verdict, whereupon the Caſe was ſuch.

Remainder, where it ſhall be ſaid Contingent.

Margaret Sanders ſeiſed in Fee, makes a Feoffment to the uſe of her ſelf for life, without impeachment of Waſt, and after to the uſe of the Feoffees for eighty years, if one Nicholas Sanders and Elizabeth his Wife ſhould live ſo long, and if the ſaid Elizabeth ſurvive Nicholas her husband, then to the uſe of the ſaid Elizabeth for life, without impeachment of Waſt, and after the deceaſe of the ſaid Elizabeth, to the uſe of Poſthumus Sanders, Son of the ſaid Nicholas and Elizabeth in tail: And for default of ſuch Iſſue, to the uſe of Elizabeth, Wife of the ſaid John Napper and Dorothy Sanders, and the ſaid Francis Sanders one of the Leſſors, and to the Heirs of their Bodies, remainder to the right Heirs of Margaret the Feoffor: And there was a clauſe in the ſaid Indenture, that the intent of the Eſtate for years to the Feoffees was, that the ſaid Elizabeth Sanders might have the profits, and not Nicholas her huſband, who was a Prodigal. Margaret Sanders dies, and Dorothy dies without Iſſue, the Feoffee enter, Elizabeth Sanders dies, Nicholas is yet alive, and Poſthumus dies without Iſſue, John Napper and his Wife, and the ſaid Francis entred and were poſſeſſed, until the Defendant as Son and Heir of the ſaid Margaret, entred and ouſted them. *Et ſi ſuper totam Materiam, &c.*

And

And the ſole queſtion was, whether the remainder in tail to Poſthumus, and the remainder in tail to Elizabeth and Francis were contingent or executed: And it was reſolved by all the Court, that the remainders were not contingent in the Eſtate for life which was to come to Elizabeth Sanders, the Wife of the ſaid Nicholas, but were veſted preſently. And it was agreed, that the Eſtate for life, if ſhe ſurvive her Husband, was contingent; and when that had hapned, being by way of Limitation of an uſe, it ſhall be interpoſed when the Contingent happen, as in Chudleys caſe, Coke lib. 1. fol. 135. a Feoffment to the uſe of the Feoffor for life, and after his death to his firſt Son which ſhall be afterwards born, for his life, and ſo to divers: And afterwards to the uſe of I.D. in tail: It is reſolved, that all the uſes limited to perſons not in Eſſe are contingent, but the uſes to perſons in Eſſe veſt preſently, and yet theſe contingent uſes when they happen veſt by interpoſition, if the firſt Eſtate for life which ought to ſupport them be not diſturbed. And in this caſe it was a good Eſtate for life in Margaret: And then gives the remainder in the Feoffees for eighty years, if Nicholas and Elizabeth Sanders ſo long ſhould live, and if Elizabeth ſurvive Nicholas, then to Elizabeth for her life, and after her decreaſe to Poſthumus in tail, and after his decreaſe to the ſaid three Daughters in tail, ſo that there the Eſtate for years determines upon the death of Elizabeth, and ſo alſo the Eſtate for life to Elizabeth which was contingent, determines by death. 21 Rep. 80. 1 Cro. 364.

And the Lord Darbies caſe, a Feoffment to the uſe of Edward, late Earl of Derby in tail, and then to the uſe of two Feoffees for eighty years, if Henry late Earl of Derby ſhould ſo long live, and after his decreaſe to Ferdinand, and to the Heirs Males of his body, and for default of ſuch Iſſue, to the uſe of William now Earl of Derby. And it was adjudged that the remainders veſt preſently: And this poſſibility that Henry might have over lived the 80 years, will not make the remainders contingent. And in a Suit which was at Lancaſter between Farrington and another, upon a ſpecial Verdict there found about 8 Jac. and many times argued at Serjeants Inne, it was afterwards adjudged a good remainder and not contingent; And the ſame caſe in this Court upon a Scire facias for to have Execution of certain Land, for debt recovered againſt the Earl of Derby, which Land was intailed by the ſame Conveyance, &c. brought againſt the Earl of Bridgwater and his Wife, one of the Co-heirs of Ferdinand, Earl of Derby, was adjudged in this Court, vide Boraſtons caſe, Coke lib. 3. fol. 20. 14 Eliz. Dyer 314. Lovies caſe, Coke lib. 10. 27 *H.* 8. 24. 38 E. 3. 26. 5 E. 3. 27. 30 E. 3. Collthurſt and Bejuſhins caſe was urged, that the remainder limited to B. for life, and after that C. hath married Ja. S. then to the uſe of C. in Fee, this is contingent, and is collateral; and this caſe is not like to that. The Lord *Derbies* caſe. *Farringtons* caſe. Plow. 24. b.

And after Argument at Bar, this Term (it being argued before that the Lord Richardſon was there, who was of the ſame opinion) we all concurred, and Judgment was entred for the Plaintiff.

Paſch.

Paſch. 8 Car.

Metcalfe *verſus* Hodgſon.

Caſe.

METcalf brought an action upon the caſe againſt Hodgſon and Wharton late Sheriffs of the City of York, and count, That whereas time out of memory, &c. there hath been a Court of Record holden before the Sheriffs of the ſaid City, upon the Bridge called Ousbridge, and that in this Court, every one having cauſe of action ariſing within the ſaid City, had uſed to commence any action for debt there, and that the Defendants being arreſted by their bodies, the Sheriffs had uſed to take Bail of them, and to let them to Bail, finding ſufficient ſureties, and that the Sheriffs are alſo, and time out of memory, have been Keepers of the Gaol there. And whereas the Plaintiff had brought an action againſt one Smith, and recovered, the now Defendants (being Sheriffs) had taken inſufficient Bail of him, &c. And upon Not guilty pleaded, it was tried before the Lord chief Baron at York, for the Bail are ſuppoſed to be taken at Wakefield, but that was not alledged, for any thing which appears, to be out of their Juriſdiction: And the Jury contrary to the direction of the Lord chief Baron gave Verdict for the Plaintiff.

An action of the Caſe lies not againſt a Sheriff, for taking of inſufficient Bail being Judges. *Peſter* verſus *Hanſon* and *Hooker*, Sheriffs of *London*, adj. Hil. 1669. B. R. That action lies not againſt them for taking Inſufficient Bail, they being Judges thereof.

And after many motions in Arreſt and praying of Judgment, it was reſolved, that this act was done by them as Judges, and for this Judicial Act no action lay: And though that the Bail by the event appear to be inſufficient, yet there is no remedy by action upon the caſe, it being without fraud or corruption, and not for reward.

And this Caſe differs nothing from the ordinary caſes of all inſufficient Bails, taken by any of the Kings Bench, Common Bench, or Exchequer: And that they having two Authorities in una perſona, it ſhall be taken to be done by that Authority by which they have power to bail, and that is as Judges of the Court, and not as Gaolers, for by this they have no power to Bail any, and in this capacity they are only ſubject to an eſcape, vide Dyer 163. Error cannot be aſſigned in that which the Court of Common Bench do as Judges, vide 12 E. 4. 19. Conſpiracy lies not for that which a Juſtice doth as Judge of Record. Querens nil capiat per breve.

No Action againſt Judges.

Mich. 8 Car.

Hickes *verſus* Mounford.

Trin. 7 Car. Rot. 514.

Repleyin.

REplevin brought by Walter Hickes againſt Simon Mounford, and others, the Defendants make Conuſance as Bayliffs to Sir John Elliot, Executor of Richard Giddy: And that the place contain twenty acres, and was parcel of the Manno of Trevelun: And that Thomas Archbiſhop of York, and Cardinal, and three others were ſeiſed of the Manno

Mannor whereof, &c. in Fee, and the third of June 11 H. 8. by Deed inrolled granted to King H.8. a Rent-charge of fifty Marks per annum out thereof in Fee, with clauſe of Diſtreſſe, and conveys the Rent by diſcent to E. 6. Mary, and Elizabeth, who by her Letters Patents granted it to Richard Giddy for life, who made the ſaid Sir John Elliot his Executor, and died, and for ſuch a ſumm arrear they Avow, &c.

The Plaintiff pleaded in Bar to this Avowry, and confeſſed the Seiſin of the ſaid Arch-biſhop, and the others, and ſaid that the ſaid Arch-biſhop and the others, the fourth of June 11 H. 8. enfeoffed Peter Edgecombe in Fee of the ſaid Mannor, who conveyed it to Richard Edgecombe Knight, who entred, and licenſed the Plaintiff to put in his Beaſts, which he did, and that they were there, untill by the Defendants diſtrained, abſq; hoc, that the ſaid Arch-biſhop and the others, the aforeſaid 3 June, 11 H. 8. granted the ſaid Rent to the ſaid King and his Heirs, Modo & forma prout the Defendant alledged, Et hoc paratus eſt verificare.

The Defendants ſay, that the Arch-biſhop and the others granted the Rent to the King modo & forma as they had alledged, and Iſſue thereupon, and the Jury found,

That the ſaid Archbiſhop and the others 11 H. 8. recovered this Land againſt Sir Peter Edgecombe, and it was to the intent of granting the Rent to the King and his Heirs, and then of the recovery of the Mannor, out of which &c. to the ſaid Sir Peter Edgecombe in tail, the remainder to the King, and they being ſeiſed by their Deed, dated the third of June 11 H. 8. ſealed and delivered, which is found in hæc verba and that it was inrolled afterwards, viz. 7. June granted the ſaid Rent to H. 8. Et ſi ſuper totam materiam, the Court adjudge it a Grant by Deed the third of June, 11 H. 8. then for the Defendant, &c.

And upon argument at Bar, and conference had, we all declared our opinion, and agreed that Judgment ſhould be given for the Defendants.

The firſt reaſon was, that the Iſſue is joyned upon the Grant modo & forma, and not upon the day, as is offered by the Traverſe, but upon the Grant modo & forma: And the matter found is generally as is alledged, vide Littleton, Title Releaſe, that modo & forma avoid and prevent the matter of day, and goes ſolely to that which is materiall: And by any thing which appears by the Verdict, there is no intervening matter after the third day, and before the ſeventh when the Deed was enrolled, and then it is a good Grant of the third of June, vide H. 7. 31. Then the ſpeciall Concluſion found, which is contrary to Law, ſhall not conclude the Judges to give Judgment according to Law.

Traverſe of a day Iſſue modo & forma.

Special verdict

Special Concluſion Contrary to Law Concludes not the Iudges.

And ſo Judgment was given for the Defendants.

Mich. 8 Car.

Cole *verſus* Wilkes.

Debt.

Debt upon the Statute of the 2 E. 6. for Tithes againſt one joint leſſee.

SAmpſon Cole brought an action of Debt upon the Statute of 2 E. 6. againſt Leonard Wilkes, Tryall at the Bar: A Leaſe was made to two, they enter and occupy, and ſet not out their Tithes, Debt was brought againſt one of them, it lies not.

But here it was found, that one only occupy the Land, and therefore the action well lies.

Sir *John Gerards* case.

And a Case was shewn, Mich. 8 Jac. An action of Debt was brought upon this Statute, by Sir John Gerard against two Tenants in Common, and it appeared that one of them set out his Tithe, and that the other afterwards took it and carried it away, and adjudged that the action lies only against him which carried it away.

Against 1 Tenant in Common.

Pach. 9 Car.

Strilley's Case.

Amendment of the proclamation of a fine.

UPon motion made in this Court for the amendment of a Proclamation of a Fine levied by Strilley of Lands in Nottinghamshire, Mich. 11 Eliz. The Proclamations endorsed by the Chirographer upon the Fine were well, but in the Transcript and Note of the Fine which is delivered to the Custos brevium by the Chirographer according to the Statute, the second Proclamation was entred to be made the twentieth of May, where it should have been the twenty third day of May, and that by the misprision of the Clerk: And it was moved that that might be amended.

And the Court was of opinion that it should be amended, for the Ingrossement upon the Fine by the Chirographer is the foundation, and that being well it is sufficient Warrant to amend the other. And the Court was of opinion, that it was a good Fine without any amendment: But it being the misprision of the Clerk, it shall be amended, as in the case Coke lib. 8 Blackamores case.

The Proclamation made and entred before the Originall shall be amended.

And it was objected, that this Fine and Proclamations as they found in the Office of the Custos brevium, are exemplified under the Great Seal, and therefore by a Clause in the Statute of 23 Eliz. cap. 3. could not be amended after such exemplification.

To that it was answered, that the Statute extends only to Fines before levied, which should be exemplified before the first day of June, An 1582. And the latter clause in the said Statute doth not extend but to Fines exemplified according to the said Statute.

And therefore it was awarded to be amended.

Pasch. 9 Car.

Glasier *versus* Heliar.

Sussex.

Case.

GLasier brought an action upon the case for words against Heliar, and shewed, that three Colliers being in an house in Sussex, were feloniously burnt in the said house, and shewed, that two or three men were indicted, convicted, and executed for the said Murther, the Defendant knowing thereof, and intending to bring the Plaintiff in perill of his life, as accessary to the said Murther, sayd to him, Thou dist

Words.

bring

bring Faggots a mile and a half to the burning of the Colliers: And after Verdict for the Plaintiff, and motion in Arreſt of Judgment, it was adjudged that the words were actionable: For if a Manſion houſe be burnt felonioully, to ſay, You brought fire to ſet in the Thatch of the houſe which is burnt, it is actionable. Felony.

Judgment pro querente.

Smith *verſus* Cornelius.

Southamp.

JOhn Smith Town-Clark of Southampton, brought an action upon the caſe againſt one Cornelius an Attorney of this Court, and ſhew, that the Plaintiff was of good fame, and Town-Clark of the Major and Burgeſſes of Southampton, and was their Scribe, and had the cuſtody of all Rolls, Pleas, and Certificates, and other proceedings before the Major and Burgeſſes in the Court before them to be holden: And the Defendant intending to draw him into Inkamp, and to cauſe him to loſe his Office, ſaid to him, Thou haſt made many falſe Certificates to the Major and Burgeſſes in that Court, and the more thou ſtirreſt in it, the more it will ſtink. Caſe. Words of a town clerke.

And it was adjudged that theſe words are not actionable.

1. Becauſe that it is not alledged that there was any Colloquium concerning his Office of Town-Clark. Colloquium

2. Becauſe that it appears not in the Count that the making of Certificates belong to his Office, but only that he had the cuſtody of them.

3. It might be falſe, and yet no blame to him, if he did know them to be falſe, or that he have made them falſe maliciouſly: And therefore Judgment was given for the Defendant.

And this Caſe was moved again by Hitcham, the firſt day of Trinity Term next, And then Judgment was affirmed.

Hil. 9 Jac.

Edwards *verſus* Laurence.

Trin. 9 Car. Rot. 2488.

Suff.

RAchel Edwards brought an action of Treſpaſſe againſt Richard Laurence for breaking of her Cloſe. Treſpaſs

The Defendant in Bar to the new Aſſignment, plead, that before the time of the Treſpaſſe ſuppoſed to be done, one Francis Tayler was ſeiſed in Fee of the Tenements whereof, &c. and ſo being ſeiſed died, whereby it deſcended to Francis his Son and Heir, who being ſeiſed thereof 8 Car. demiſed it to the Defendant for two years, by vertue whereof he entred, and gives colour to the Plaintiff by a Grant made to him by Francis the Father, where nothing paſſed thereby, and ſo juſtifie. Traverſe of Seiſin.

The Plaintiff replyed, that long before Francis Taylor the Son had any thing, one Francis Taylor Grand-father of the ſaid Francis was ſeiſed

ſeiſed in Fee, and before the time of the Treſpaſſe ſuppoſed, viz. 8 Jac. in conſideration of a Marriage to be between the ſaid Francis his Son, and the Plaintiff, for her Joynture made a Feoffment thereof to the uſe of the ſaid Francis, and Rachel the Plaintiff, and to the Heirs of the ſaid Francis, upon the body of the Plaintiff begotten, the remainder to the Heirs of Francis in Fee, and ſhewed the marriage, and that by force of the Statute of 27 H. 8. they were ſeiſed ut ſupra is limited, Abſque hoc, that the aforeſaid Francis Tayler the Father of the aforeſaid Francis the Son, died ſeiſed of the Tenements aforeſaid with the Appurtenances, de nova aſſignat. in his Demeſn as of Fee, Modo & forma prout prædictus defendens ſuperius allegavit, & hoc paratus eſt verificare, &c. unde, &c. whereupon the Defendant demurred.

Vide 3 H. 6, Brook Traverſe, 30 H. 6. 7. Brook Traverſe 359. In Treſpaſſe the Defendant plead his Freehold, the Plaintiff plead the dying ſeiſed of his Father, and that he is Heir and entred, and that the Defendant diſſeiſed him, the Defendant traverſed the Diſſeiſin, and not the dying ſeiſed of his Father, and good, vide the ſaid Book of 30 H. 6. 7. by Priſot, if I in Aſſiſe plead that my Father died ſeiſed in Fee, & that I entred as Son and Heir to him, and was ſeiſed untill by R. diſſeiſed, who enfeoffed the Plaintiff, upon whom I entred, here the Diſſeiſin is not traverſable, but the dying ſeiſed, vide 33 H. 6. 59. Wangford put this caſe, In Aſſiſe if the Defendant plead that his Father was ſeiſed and died ſeiſed, and give colour to the Plaintiff, the Plaintiff ought to traverſe the dying ſeiſed, and not the poſſeſſion of the Father, which is the cauſe of the dying ſeiſed.

Vide 30 H. 6. fol. 4. Entry in nature of an Aſſiſe, the Defendant plead that W. was ſeiſed in Fee, and enfeoffed him, and give colour, the Plaintiff replies that W. was ſeiſed in jure Uxoris, and that he had Iſſue, and his Wife died, and he was Tenant by the Curteſie, and made a Feoffment, ſans ceo, that W. was ſeiſed modo & forma, and Iſſue take, and there it is ſaid, that the Iſſue is well taken.

This caſe was adjudged for the Plaintiff, becauſe that no dying ſeiſed is pleaded, ſo that it might be traverſed, but with a Sic ſeiſitus obijt. And the matter only traverſable here, is the ſeiſin in Fee modo & forma, for by the Replication Seiſin jointly with the Plaintiff, and to the Heirs of the body of the ſaid Francis, with a Fee-ſimple in him, is confeſſed, and that is good with the Traverſe.

Memorand. That this Caſe was moved by Serjeant Hitcham, Trin. 10 Car. And Serjeant Hedley moved for the Defendant, and vouched 5 H. 7. 7. and the Record was read, and all the Court agreed that it was a good Traverſe, And that Judgment ſhould be given for the Plaintiff.

Paſch. 10 Car.

Dawe *verſus* Palmer.

Caſe.

Words of a Tradeſman.

JOhn Dawe Plaintiff againſt William Palmer, in an action upon the Caſe, and count that whereas he was a Fuller, and he uſed the Trade of Fulling, and thereby acquired his livelyhood, and was of good Credit, &c. The Defendant ſaid of him, Truſt him not for he

owes

owes me a hundred pound, and is not worth one Groat: And at another day he ſaid, He is a Bankrupt Rogue; And upon Not guilty pleaded, the Jurors found for the Plaintiff, and gave entire Damages. 1 Cro. 265. acc.

And it was moved in Arreſt of Judgment, that the firſt words were not actionable, and then the Jury having given entire Damages, the Plaintiff ſhould not have Judgment for any part, vide Osbornes caſe, Coke lib. 10. But in this caſe after many debates, it was reſolved by the Court, that the Plaintiff ſhould have Judgment. For the firſt words are actionable at Common Law before the Statute, Truſt him not, he is not worth one Groat. Go not to buy of J. S. (a Merchant) for he will deceive you. Of an Inn-keeper, Go not to ſuch an Inne, for he is ſo poor that you can have no good entertainment. Of an Attorney, Uſe him him not, for he will couſen you. All theſe words are actionable. He will be a Bankrupt within ſeven daies.

And for the other words, That he is a Bankrupt Rogue, that is reſolved Coke lib. 4. to be actionable. And it was a Caſe Paſch. 10 Car. in a Writ of Error brought in the Exchequer Chamber, upon Judgment given in the Kings Bench, between Dunkin and Laycroft, for words ſpoken of a Merchant, who had been at Hamborow in partibus tranſmarinis, and there had uſed the Trade of a Merchant and Factor. Thou (*innuendo* the Plaintiff) cameſt over from Hamborow a broken Merchant; And adjudged actionable, and ſo affirmed in the Exchequer Chamber. And upon all theſe Authorities the Court gave Judgment for the Plaintiff. *Dunkin* and *Laycroft*.

Mich. 10 Car.

Deanes Caſe.

27. Eliz. Cap. 13.

DEane being robbed in an Hundred in Kent, brought an action upon the Statute of Hue and Cry, and a ſpeciall Verdict being found, the Point intended was.

If one be aſſaulted to be robbed in one Hundred, and he eſcape and flye into another Hundred, and the Theeves inſtantly purſue him, & rob him there, if the Hund. in which he was robbed ſhould be ſolely charged. Aſſault in one Hundred Robbery in another, the laſt Chargable.

And the opinion of the Court was, that it ſhould; but upon reading the Record, this appeared not to be the Caſe. And the Court was informed, that the Sheriffs had taken the Goods of one in execution, who was not inhabiting within the Hundred at the time of the Robbery committed, but came afterwards: And the Court was of opinion that he was not chargeable March's Rep. 11. per Bukly Contr. Inhabitants at the Execution not at the Robbery.

Mich. 10 Car.

Knight *verſus* Copping.

RObert Knight brought an action upon the caſe againſt Valentine Copping one of the Attorneys of this Court, & count, That whereas one Edw. Loft had brought an action of debt for 30l. againſt him: And thereupon ſuch proceſſe was, that a non proſ. was entred, & coſts of 30s. aſſeſſed for the now Plaintiff, the now Defendant being Attorney for the ſaid Ed. Loft having notice thereof, unduly and maliciouſly procured a judgment to be entred for the ſaid Ed. Loft, againſt the now Plaintiff, & ſued execution againſt him, whereby he was taken and impriſoned, untill he was delibered by a Writ of Superſedeas. Caſe.

An action of the caſe for entring Judgment after *non proſ.* and taking in Execution.

The Defendant Proteſtando, that there was no ſuch Judgment for the ſaid Edward Loft, againſt the ſaid now Plaintiff, nor that he was taken in Execution thereupon, for plea ſaith, that there is not any Record of the ſaid Non Proſ.

The Plaintiff replies, that at the time of the ſaid Judgment entred for the ſaid Edward Loft; And when the now Plaintiff was taken in Execution and impriſoned thereupon, the ſaid Judgment of Non proſ. againſt the ſaid Edw. L. and the Award of Coſts were in full force and effect: But that afterwards viz. ſuch a time, as well the ſaid Judgment de non proſ. as the ſaid Judgment of thirty pounds Debt againſt the now Plaintiff were evacuated, whereupon the Defendant demurred.

And it having been often debated by Hitchrm for the Defendant, and Henden for the Plaintiff: And now upon Oyer of the Record and of the Judgment, the Court gave Judgment for the Plaintiff.

And the Lord Finch ſaid, that this action upon the caſe is grounded upon two miſdemeanours.

1. The procurement of the ſaid Judgment for Edw. L. after a Non pro. entred for the Defendant: And though the Judgment was erroneous, yet the now Plaintiff was vexed and impriſoned thereby, which indeed is the clauſe of this action.

2. The taking of him unlawfully, when the firſt Judgment de non proſ was in force, and the Plea of Nul tiel Record go only to one of the Cauſes: And admitting that there was never a Judgment de non proſ. but that the Defendant had unlawfully procured a Judgment, and take Execution thereupon, and procured the Plaintiff to be taken in Execution and Impriſoned, this is cauſe of action: And to that he hath not anſwered, and therefore he ought to have pleaded Not guilty to that which he takes by proteſtation.

Proteſtation.

Judgment pro querente.

Paſch. 11 Car.

Baker *verſus* Hucking.

Adjudged B. Rs.

1 Croke 405. 387.

TEnant in tail, and he in Reverſion joyn by Deed in a Leaſe for life, he in Reverſion deviſe the Land by his Will to one in Fee, and dieth, Tenant in tail dies without Iſſue, and the Heir of him in Reverſion, and the Deviſee claim the Land.

Tenant in tail and he in Reverſion make a Leaſe for Life.

And the ſole queſtion is, if this Leaſe be a diſcontinuance, and it was adjudged a Diſcontinuance, and then the Deviſe void, for he had not a Reverſion.

Diſcontinuance.

And the difference was taken, when Tenant for life, and he in Reverſion joyn in a Leaſe by Deed (for without Deed it is firſt a Surrender, and then the Leaſe or Feoffment of him in Reverſion (it ſhall be the Leaſe of Tenant for life, ſo long as he live, and after the Leaſe of him in Reverſion, and yet they ſhall joyn in a Writ of Waſt.

V. 1 Inſt. 42. b.

And in this caſe there is no queſtion but if the Leaſe had been made ſolely by Tenant in tail, that then it were a Diſcontinuance, and the joyning of him in Reverſion alters it not, for that amounts to nothing but

but as a Confirmation, and is not like to Bredons caſe; Coke lib. 1. fol. 76. Where Tenant for life, and he in remainder in tail levy a Fine, for every one there paſſeth that which lawfully he may.

And upon Argument it was adjudged, that it was a Diſcontinuance and not the Leaſe of him in Reverſion, but his Confirmation.

Juſtice Crooke differed in opinion.

Mich. 11 Car.

Laſhbrookes Caſe.

Somerſet.

LEwes Laſhbrook an Attorney of this Court brought an action of Treſpaſſe againſt I. S. for entring into his houſe and breaking his Cloſe. And in the new Aſſignment he alledged the Treſpaſſe to be in a houſe called the Entry, and in a houſe called the Kitchin, and in his Garden, and in one Cloſe called the Court.

The Defendant as to the force, &c. and to all beſides the Entry plead Not guilty; And as to his entry into the Court and Kitchin, and the Tenements aforeſaid of the new Aſſignment, he plead that he had brought an action againſt a woman for Treſpaſſe, and had ſo proceeded that he recovered, and had execution directed to the Sheriff of Somerſetſhire, and thereupon a Warrant directed to four ſpecial Bayliffs, to arreſt the ſaid Woman, and two of them at Minehead, in the County of Somerſetſhire, arreſted her, and carried her to the houſe of the Plaintiff in Minehead, being a Common Inn, and the Defendant entred into the ſaid houſes called the Entry and Kitchin, and the Tenements aforeſaid of the new Aſſignment, to ſpeak to the Bayliffs, and to warn them to keep her ſafe: And as ſoon as he could he returned, whereupon the Plaintiff Demurred. A Warrant to four, and two of them execute it.

And now Henden took two Exceptions, the firſt was,

1. That the Defendant had not pleaded to all the Cloſes, but that was over-ruled, for he juſtified in the tenements aforeſaid of the new Aſſignment.

2. The ſecond was, that the Warrant to the Bayliffs was to all, and not Conjunctim and Diviſim, and therefore it ſhould be by all, and not by two only. Authority joint Executed ſeverally.

To that it was anſwered and reſolved, that when a Sheriff makes ſuch a Warrant, which is for the Execution of Juſtice, that may be by any of them, for it is Pro bono publico: And the very Caſe was adjudged 45 Eliz. between King and Hebbs, Coke Littleton 181. b.

And Judgment was given for the Defendant.

Hil. 11 Car.

Davies Caſe.

Hereford.

DAvies an Attorney of this Court, brought an action upon the caſe for theſe words, If I liſt I can prove him Perjured: And the opi- Words.

nion

Not affirmative.

nion of the Court was, that they were not actionable, for there is not any Affirmative, that he was perjured, but a thing which is Arbitrary, and ſaies not that he would do it. Judgment pro Defend.

Mich. 7 Car. Rot. 1097.
Alſton *verſus* Andrew.

Suff.

The Obligor and the Obligee make the ſame perſon Executor.

PEter Alſton Executor of Peter Alſton, brought an action of Debt upon an Obligation of a hundred and twenty pounds againſt William Andrew, and Edward Andrew, and count, That the Defendants and one Francis A. became obliged to the Teſtator, &c. and that they did not pay it to the ſaid Teſtator in his life, nor to the now Plaintiff, and one Francis Andrew Co-executor with the Plaintiff, who is ſummoned, and the Plaintiff admits to proſecute alone with the ſame Francis, &c.

The Defendants demand Oyer of the Obligation which is entred in hæc verba, and plead that Francis A. in the ſaid Writing named, after the making thereof, made the ſaid Francis Andrew and Barb. A. his Executors and died: And that the ſaid Francis A. accepted the Burthen of the Teſtament: And after the ſaid Peter Alſton the Teſtator made his will, and Conſtituted the Plaintiff and the ſaid Francis his Executors, and died, Et hoc paratus eſt verificare, unde, &c. wherupon the Plaintiff demur.

Hob. 10. Fryers Caſe.

Trugeon and *Meron.*

Mich. 2 Jac. Rot. 2663. Garret Trugeon Plaintiff againſt one Anthony Meron and others the Adminiſtrators of Benjamin Scrivin upon a ſingle Bill: The Defendants demand Oyer of the Bill, whereby it appears, that one John Simcocks was obliged to the ſaid Trugeon joyntly and ſeverally with the ſaid Scrivin, Quibus lectis & auditis, the Defendants ſayd, that the ſaid Simcocks died inteſtate, and that the Adminiſtration of his Goods was granted to the now Plaintiff, who accepted the Burthen of the Adminiſtration, and Adminiſtred, the Plaintiff demurred, and Judgment againſt the Plaintiff.

1 Croke 373. Contr. Plowd 186. Contr. Cook lib. 8. fo. 136. accord.

8 E. 4. 3. 21 E. 4. 2. Lit. 264. b. 20 E. 4. 17. If the Debtee makes the Debtor and others his Executors, the Debt is diſcharged.

Dorcheſter and *Webb* 1 Croke. 372.

Mich. 9 Car. Banco Regis, Rot. 373. Anne Dorcheſter Executrix of Anne Row, Plaintiff againſt William Webb, in Debt upon an Obligation of five hundred pounds, the Defendant demanded Oyer, whereby it appears, that the Defendant and one John Dorcheſter were obliged joyntly and ſeverally in the ſaid Obligation.

The Defendant plead in Bar, that the ſaid John Dorcheſter made the Plaintiff his Executrix, who proved the Will, and had Goods ſufficient in her hands to pay the ſaid Debt.

The Plaintiff reply, that before the death of the ſaid Anne Row the Obligee, ſhe had fully Adminiſtred all the Goods of the ſaid John Dorcheſter. Demurrer and Judgment for the Plaintiff.

And in this caſe it is not ſhewn, that the ſaid Francis and Peter, or any of them proved the Will of the ſaid Obligee, or that they adminiſtred his goods, or that they had any goods of the Obligor to adminiſter at the time of the death of the Obligee, as it ought to have been ſhewn: And the ſaid Francis Executor of the Obligee, and alſo of the Obligor, refuſed

refuſed to be Executor to the Obligæ, and never Adminiſtred, and never medled with the Goods of the Obligee, and ſo the Debt is not releaſed in Law, as by the ſaid Caſe and former Judgment appears.

This Caſe had been often argued by Serjeant Hedley, and of the other part by Serjeant Hitcham, and affirmed, that once Judgment was given for the Defendant, but it yet depends.

Trin. 12 Car.

Liberty may not be given to Priſoners by force of a *Habeas Corpus*.

MEmorand. Upon Petition exhibited to the King by the Priſoners of quality, which were in execution in the Fleet, Kings Bench, and Marſhalſey, to have liberty in the time of Infection, and for preſervation of their lives to have liberty by Writs of Habeas Corpus to go into the Country, upon ſecurity given to the Warden and Marſhal for their return. The King (out of the great care of their ſafety) referred their Petition to the Lord Keeper Coventry, and that he, with the advice of the Judges, ſhould conſider by what way it might be done: and the eighteenth day of June we attended the Lord Keeper at Durham-houſe; and there upon conference and conſideration of a former Reſolution which was at Reading in Mich. Term laſt, before the ſaid Lord Keeper (where were preſent all the Judges, beſides my ſelf.) That theſe abuſive Habeas Corpus were not lawful, and that the Warden and Marſhal were then called and warned, that they ſhould not ſuffer their Priſoners to go into the Country, as they had uſed to do, by colour of ſuch Writs: This which follows was ſubſcribed.

Habeas Corpus.

WE are of Opinion, that the Writ of *Habeas Corpus* is both Ancient and Legal; but as the Writ doth not, ſo no Rule can Authorize the Keeper of the Priſon to give liberty to his Priſoner, by colour of ſuch Writ, but the ſame is an abuſe againſt Law, and an Eſcape in the Keeper, if he let the Priſoner go by ſuch Writ.

Priſoners in time of Plague.

We find, that neither in the twenty fourth year of *Eliz.* when the Term was Adjourned to *Hertford*. Nor in the 34*th* of *Eliz.* in which year it was Adjourned to *Hertford*. Nor in the 35*th* of *Eliz.* in which year it was Adjourned to St. *Albans*. Nor in 1 *Jac.* in which year the Term was Adjourned to *Wincheſter*. Nor in the firſt of King *Charles*, in which year it was Adjourned to *Reading*. (In all which years there were great and dangerous Infections of the Plague) there was no ſuch courſe to ſet Priſoners out of Priſon by *Habeas Corpus*; but we find it a Novelty begun of late years.

But We think, that if the danger of Infection ſhall grow ſo great, as it ſhall be found neceſſary to provide for the ſafety of the Priſoners (who may at all times provide for themſelves by paying their Debts, and yielding obe-

dience to Juſtice) then a courſe may be taken that ſome certain houſe may be aſſigned for the Warden of the Fleet, in ſome good Town, remote from the Infection, and the like for the Marſhal of the *Kings Bench*, in ſome other Town, where they may remove ſuch Priſoners as have been Petitioners to his Majeſty, and there keep them as Priſoners, *Sub arcta & ſalva Cuſtodia*, as they ſhould be kept in their proper Priſons, and not to be as Houſe-keepers in their own houſes; and by this means they will have the like to avoid the Infection, as other Subjects have, and not make the Infection a cauſe to abuſe their Creditors, or delude the courſe of Juſtice.

John Bramſton	1.	*Humph. Davenport*	6.
Richard Hutton	2.	*William Jones*	7.
George Crooke	3.	*Thomas Trevor*	8.
George Vernon	4.	*Robert Barkley*	9.
Francis Crawley	5.	*Richard Weſton*	10.

To Sir John Bramſton *Knight, Lord chief Juſtice of* England.

My very good Lord,

I Have acquainted his Majeſty with your reſolution, and your Brethren, about Writs of *Habeas Corpus*, his Majeſty doth exceedingly approve the ſame, And hath commanded me to let you know, that his Majeſty would not recede from that which you have certified, And prays you and the reſt of my Lords the Judges, to obſerve it conſtantly, according to that reſolution under your hands:

Hampton Court, 19 *June*, 1636.

Your Lordſhip's aſſured,

Tho. Coventry, *C. S.*

Mich.

Mich. 14 Car.

Juſtice Huttons caſe *verſus* Hariſon.

MEmorand. That 28 Aprilis, 14 Car. Juſtice Hutton argued in the Exchequer Chamber in the Caſe adjourned thither, upon a Scire facias by the King againſt Hampden for Ship-money, in which he was of opinion, that as well for the matter as for the form, upon divers exceptions to the pleading, Judgment ſhall be given againſt the King.

Afterwards, viz. 4 Maii, Thomas Hariſon Batchelor of Divinity, and Parſon of Creake in Northamp. came to the Court of Common Bench (Juſtice Hutton, and Juſtice Crawley then being there giving Rules and Orders) and ſaid, I accuſe Mr. Juſtice Hutton of High Treaſon, for which he was committed to the cuſtody of the Warden of the Fleet by Juſtice Crawley; and after by the direction of the King, he was indicted in the Kings Bench, and convicted and fined five thouſand pounds to the King: And Juſtice Hutton preferred his Bill againſt him there, and recovered ten thouſand pound Damages.

Words againſt Juſtice *Hutton*. 1 Croke 503.

Lord Digbies caſe.

MEmorand. That in the Parliament holden primo Car. It was reſolved by the Judges upon conference concerning the Lord, Digby, That when any Peer ſhall be proceeded againſt for Treaſon, that ought to be by Indictment, and that being done, then the King is to appoint a Peer to be Steward for the time, and then to proceed to Arraign him, or otherwiſe to tranſmit this Indictment by Certiorari, to the Parliament, and there to proceed, vide 10 E. 4. 6. 1 H. 4. 1. vide Coke Lit. fol. 261. b. Or otherwiſe to prefer a Bill in the Parliament, which ought to be paſſed by both Houſes, and then it is attainder by Parliament, and ſo it was done, 5 R. 2. 54.

Trial of a Peer how, v. devant 116.

Where trial of Treaſon by the Statute of 3 *Jac. cap.* 4. ſhall be, and how.

But in this Caſe, it being that part of the Treaſon objected againſt him, was ſuppoſed to be done Ouſt le mere, and made Treaſon by the Act of 3 Jac. cap. 4. that cannot be tried but by Indictment, to be taken before the Juſtices of Aſſiſe, and Gaol-delivery, where the party was taken, or before the Juſtices of the Kings Bench, any Law, Cuſtome, Statute, or uſage to the contrary notwithſtanding; And ſo it cannot be tried by the Statute of 35 H. 8. cap. 2. in what place or Shire that the Kings Bench ſhall be, for this Statute had for this Treaſon preſcribed a ſpecial form of Trial, and the place where he ſhall be taken ſhall be expounded, the place where he is impriſoned, as upon the Statute of Soldiers: And he which is charged to have two Wives living, ſhall be tried in the place where he is taken, which is the place where he is impriſoned, vide 2 Inſt. 49.

Trial for Treaſon done in part over-Sea.

How.

Where.

Trial for two Wives, where.

Trin.

Trin. 12 Car.

Queries concerning Aliens.

QUæries upon the Statutes of 1 R.2.cap.9. 1 *H.*7.cap.2. 14 *H.*8.cap.2. the Decrees in the Star-chamber made 20 *H.* 8. and confirmed 21 *H.*8.cap.16. 22 H.8.cap.8. 32 *H.* 8. 16. and other Statutes concerning Aliens, and the Statute of 5 Eliz.cap.4.

1. Whether the Statute of 5 Eliz. cap.4. doth repeal the former Statutes concerning Aliens, taking Apprentices, Journy-men, and Servants.

2. Whether Aliens made Denizens, may uſe any handycraft within the Realm, otherwiſe then as Servants to the Kings Subjects.

Memorand. That on the ſeventh day of July, We met at Serjeants Inne in Fleetſtreet (Mr. Attorney-general being there) and We debated the matter, and upon peruſal of the Statute of 1 R. 3.cap.9. and the other Statutes: And upon ſome miſ-recital of the Statute 1 R. 3. by the Statute 32 *H.*8.cap.16. And upon differences of the Printed Statute from the Parliament Roll, as was ſuppoſed, upon ſhewing of an old Book of Statutes, which was in French, and brought by my Brother Crook; and upon the intricacy of the Statute, We could not reſolve on the ſudden, upon theſe Queſtions at this time, nor unleſs the Parliament Roll might be ſeen.

But upon peruſal of the Statute of 5 Eliz. cap.4. We all reſolved and agreed.

Reſolves upon the Statute of 5 *Eliz.cap.*4. concerning Aliens. *Willys* verſus *Foot*, 1657. *per* S. *Johns* Ch. Juſt. C.B. a Glazier ſerving 7 years to the Trade in *Rotterdam*, may ſet up in *London.*

That all Aliens and Denizens are reſtrained by the Statute of 5 Eliz.cap.4. That they may not uſe any Handycraft mentioned in the ſaid Statute, unleſs they have ſerved ſeven years as Apprentices within this Realm, according to the proviſion of this Statute: This was ſet down in writing by Sir John Banks his Majeſties Attorney General preſent: Sir John Bramſton chief Juſtice of England, Sir John Finch chief Juſtice of the Common Bench, Sir Humphrey Davenport chief Baron, Baron Denham, Juſtice Hutton, Juſtice Crook, Baron Trevor, Juſtice Crawley, and Baron Weſton, the other Judges being abſent, viz. Jones and Vernon.

Hil. 12 Car.

Souſer *verſus* Burton.

ONe Widow Souſer brought an action of the Caſe againſt Burton, in theſe words, Thou old Witch, thou old Whore, leave off thy Witching, or elſe thou ſhalt be hanged or burned, if I can do it. And upon Not guilty pleaded, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment; and it ſeemed to Lord Finch, Hutton, and Vernon that the action lay not, without ſhewing that ſhe did any act of Witchcraft, for which the pain of Pillory and Impriſonment for two years ſhould be inflicted, and the ſecond time Felony: And that the words, Thou art an old Witch, or go away thou old Witch, are uſual words, and old Whore bears no action: And as to ſay, Thou ſhalt be hanged if I can do it, it is not poſſible that he could do it.

Vide ante 13.

Words. Witchcraft.

But

But Juſtice Crawley doubted of it at firſt, becauſe that it was alledged, that it had been adjudged in the Kings Bench, that an action lies for calling one Witch; But afterwards he ſaid, that he had ſpoken with the Juſtices of the Kings Bench of their reaſon, who ſaid, that they adjudged no ſuch thing, unleſſe that he ſpoke further, that the party had done any act of Witchcraft puniſhable by the Statute.

Hugles *verſus* Drinkwater.

In Account payment by appointment of the Plaintiff, is no plea before the Auditors where the Iſſue was *Ne unques receivor*.

AN action of Account by William Hugles againſt Thomas Drinkwater, for receit of eighteen pounds, by the hands of one William Appowell, to the uſe of the Plaintiff, the Defendant plead Ne unques receivor per manus, &c. and found for the Plaintiff: And the Defendant before the Auditors plead, that he by the appointment of William Appowell had paid it to one John Marſh for the Debt of the Plaintiff, and thereupon Demurrer. And adjudged a bad Plea, and againſt his former Iſſue: And the ſaid Appowell by whoſe hands he received the ſaid ſumm, had not any power to appoint the Defendant to pay it to John Marſh, to whom the Plaintiff was indebted; and if that had been pleaded in Bar of the Account, to have been done by the appointment of the Plaintiff, it had been a good Bar, vide Dyer 29. 196. after ne unques receivor, and the truth was that he had been Receiver, and had paid it over by the appointment of the party, and yet by this Plea he hath loſt the advantage thereof.

An. 2. Car.

In what caſes a priſoner arraigned ſhall have Councell.

MEmorand. That the 19. day of May, An. 2 Car. all the Judges being aſſembled at Serjeants Inn in Chancery Lane, by the commandment of the King, the Attorney General propounded, that the King would be ſatisfied by our opinion, Whether any perſon which is arraigned of Treaſon or Felony, ought by the Fundamental Lawes of this Realm to have Councell; And We all una voce anſwered.

That when any one is indicted of Felony or Treaſon, or any other ſuch offence, the party ought not to have any Councell, unleſſe it be upon matter in Law, as where he demand Sanctuary, or plead any ſpecial matter, and that is agreed by Stamford, fol. 151.

Alſo this extends as well to Peers of the Realm, as to others, vide 1 H. 7. 23. and the 9 E. 4. 2. and ſo it was agreed by all, that although the party ſhall have Councell in an Appeal of Murther, yet if he be non-ſuited, and the party be arraigned upon the Declaration, then he ſhall have no Councell.

Alſo it was reſolved, that when the party who proſecute, ſuppoſe that the Grand Jury will not find the Indictment, & therefore requires that the Evidence ſhould be given publickly to the Jury at Bar (which is ſometime done) yet the party who ſhall be indicted, ſhall not have Councell. And the Attorney General was commanded to report our opinion to the King: And this hapned to be demanded upon the general inconvenience that might after enſue in the Caſe of the Earl of Briſtol, to whom the King had allowed Councell.

Mich. 3 Car.

MEmorand. That the fifth of November, at Serjeants Inne in Fleet-ſtreet, there aſſembled the Lord Hide, Lord Richardſon, Lord Walter, Juſtice Doderidge, Baron Denham, Juſtice Hutton, Juſtice Jones, Juſtice Whitlock, Juſtice Harvey, Juſtice Crook, Juſtice Yelverton, and Baron Trevor, to conſider of a Caſe which was propounded, which was;

1 Croke 91 Reſolves concerning Souldiers.

One receives Preſſe-money to ſerve the King in his Wars, and is in the Kings Wages, and with others is delivered to a Conductor, to be brought to the Sea-ſide, and with-draweth himſelf and runneth away without licenſe.

The Queſtion was, if it were Felony.

And time being given before to adviſe concerning it, all agreed beſides Croke, Yelverton and my ſelf that it was Felony.

V. Cook lib. 6. fol. 27.

And the ſole queſtion is, if a Conductor be a Captain within the 7 H. 7. cap. 1. and the 3 H. 8. cap. 5. And they ſaid, that it is not neceſſary that he ſhould be ſuch a Captain as is to lead and command them in the War, or that hath ſkill to inſtruct; But ſuch as hath the leading of them by agreement, between the Deputy Lieutenants, and them, and that ought to provide for the Billeting of them, and to carry them to the place of Randezvous. And one part of a Captain is to conduct, although that Conduxit be properly to hire a Souldier, yet this name Conductor, with whom it is ſo agreed by Indenture to conduct the Souldiers, is a Captain, within the intent of thoſe Statutes; and if it ſhould not be ſo, theſe Statutes (which are for the defence of the Realm) ſhall be of little force.

But it was agreed by them, that if theſe Conductors (which are ſo called of late times) be hired to carry them but to one place, and there another Conductor to receive them, this is not within the Statute; And it ought to be ſuch a Conductor that can give licenſe upon juſt cauſe to depart. It was ſaid, that they uſed to ſend Captains into the Country, but then they were ſo chargable to the Country, and full of diſorder, that upon complaint of the Juſtices of Peace, about 43 Eliz. this courſe was invented, viz. That the Deputy Lieutenants ſhould provide for them that were preſſed, for Coats and Conduct, and they ſent their Souldiers to a place appointed to be delivered to certain perſons, whom the Queen appointed, to receive them. And it was ſaid, that though the Caſe as it is propounded might be cleer, yet there are many Circumſtances which ought to be proved, and that are left to the diſcretion of them before that he ſhould be tryed.

It was unanimouſly agreed, that if one takes Preſſe-money, and when he ſhould be delivered over, he withdraw himſelf, that is not Felony, although he is hired and retained to ſerve.

Penal Laws taken ſtrictly.

But my Brother Yelverton and Croke & I were of opinion, that this new name newly invented, is not Captain within theſe penall Statutes which ought to be taken ſtrictly, vide Plowden 86. that penalties which concern life ſhall not be taken by equity, but if they be within the words of the Statute, then they ſhall: As to kill his Miſtreſſe, is within the words, for Miſtreſſe is Maſter.

Another reaſon was, that the Statutes provide puniſhment for Captains which want of their number, or which pay not their Souldiers within

within ſix daies after they have received their pay, upon pain of forfeiting all their Goods: And the Statute did not intend other Captains in this point, then was in the former and latter part thereof.

But admitting that a Conductor is ſuch a one to whom the Souldiers are delivered by Indenture with all Covenants uſuall, viz. To pay to them their Wages, and to convey them to their appointed place, and that he may give licenſe to depart; yet they agreed, that it is the better and clearer way that they ſhould be made Captains, and ſo named in the Indentures, for the King may change the Captain at his pleaſure, and then it ſhould be no queſtion,

It was agreed, that 7 H. 7. cap. 1. extends only to them who are retained and preſſed to ſerve the King upon the Sea, or upon the Land beyond the Sea; And the Statute of 3 H. 8. cap. 5. adds only the Land here: And the Statute makes departure without licenſe from the Captain Felony, and the Statute 3 H. 8. without licenſe from the Lieutenant: And the Statute of 7 H. 7. makes the tryal to be in the County where they ſhall be taken before the Juſtices of the Shire, as they may try other Felonies within their Commiſſion: The Statute of 3 H. 8. makes their tryall before the Juſtices of the County, where they are taken, and this being a new Felony and made tryable againſt the Common Law (which appoint tryals by Jurors of the County where the Fact is committed) and appoint a ſpecial Judge, viz. Juſtices of Peace, that is only tryable before them, and not before Commiſſioners of Oyer and Terminer, who cannot try any thing, but that which is done in the ſame County: But this, if all be not done in that County where they are taken, makes it tryable only before the Juſtices of Peace of the County where they are taken.

In this point all were not reſolved, but required longer time, vide 2 Inſt. 56.

Sir Richard Champnons Caſe.

A Writ of Covenant is proſecuted, Jan. 23. returnable Oct. Purificat. The Dedimus poteſtatem is teſted 23 Jan. the Judge certifie the Concord taken Febr. 24. which is two daies after the Term, at which time the Writ of Covenant is not depending, the Fine is hæc eſt finalis Concordia facta in Oct. Purif. And after it is recorded in 15 Paſch. and yet adjudged a good Fine, vide the Statute of 23 Eliz. 3. Dyer 220. b. Carels Caſe.

A Fine of *Oct. Purif.* where the Caption was, *Feb.* 14. 1.

Mich. 4 Car.

Jones *verſus* Powell.

JOhn Jones Plaintiff, againſt James Powell Defendant, in an action upon the Caſe for a Nuſance, count, That the Plaintiff, 10 Auguſt, 1 Caroli, was and is, and for forty years laſt paſt, hath been poſſeſſed for divers years yet during, of a Meſſuage, in which he and his family did by the time aforeſaid dwell: And by all that time hath been Regiſter to the Biſhop of Gloc. and kept his Office there, that the ſaid Defendant the tenth day of Auguſt, and ever ſince hath held in poſſeſſion another houſe over againſt the Plaintiffs; And they being ſo poſſeſſed, the

Caſe for Nuſans.

Nuſans 1.

the Defendant the ſaid 10. of Aug. erected a Brewhouſe, and a Priby in the ſaid houſe, and burned Sea-coles in the ſaid Brew-houſe, ſo that by the Smoke, ſteneh, and unwholeſome vapors coming from the ſaid Coles and Priby, the Plaintiff and his family cannot dwell in the ſaid houſe without danger of their health. Not guilty pleaded, Verdict for the Plaintiff. The Plaintiff prayeth Judgment, and doth offer for Authorities in this Caſe.

Nuſance.

Smith and. *Mopham.*

4 Aſſ 3. 4 E. 3. 37. 5 E. 3. 47. new Book of Entries, fol. 19. in 5 Jac. between Smith and Mopham, an action upon the caſe for erecting a Tan-fat, with averment of corrupting the Air and water, to the annoyance of the Plaintiff, and adjudged for the Plaintiff after Verdict.

Coke lib. 4. Aldreds caſe pleaded in new Book of Entries, fol. 106. an action of the caſe for erecting a Hogſty, Ad nocumentum aeris adjudged.

22 H. 6. 14. by Newton, an action upon the caſe lyeth expreſly.

1 Bulſtr. 116. *Blande* againſt *Moſely.* V. Caltrop's Reports del Cuſtoms de Londres, f. 45.

Trin 29 Eliz. Bland againſt Moſely, an action of the caſe for ſtopping Lights in London, adjudged a void Preſcription, to build ſo high that the Neighbors Lights are thereby ſtopped in a City.

Old Book of Entries, fol. 406. in the Edition 1596. action upon the Caſe brought for annoying a Pilcary with a Gutter, hat came from a Dye-houſe. 1.

And there an action brought againſt a Dyer, Quia fumos fœditat & alia ſordida juxta parietes querentis poſuit, per quod parietes putridæ devenerunt, & ob metum infectionis per horridum vaporem, &c. ibid. morari non audebat.

13 H. 7. 26, An action lieth againſt a Glover, becauſe he with a Lime-pit ſo corrupted the water, that the Tenants departed.

F. N. B. 185. b. A Writ lyeth to the Major of a City to cleanſe the Streets from filth, whereby infection might grow.

By which caſes it appeareth, that although Sea-cole be a neceſſary Fuell to be uſed, and that Brew-houſes are neceſſary, yet the Rule in Law is, Sic utere tuo, ut alienum non lædas: And Chimneys, Dye-houſes, and Tan-fats are alſo neceſſary, but ſo to be uſed, that they be not prejudicial to their Neighbors.

And in this Caſe the Jury found that this new Brew-houſe and Priby was maliciouſly erected to deprive the Plaintiff of the benefit of his Habitation and Office, and that the Plaintiff was hereby damnified, as in the Declaration is alledged.

And upon Conference and Conſideration of the Caſe, all the Judges did concur that Judgment ſhould be given for the Plaintiff. Vide 1 Croke 510. que un tallow furace eſt Nuſance.

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